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E. ROBERT SEAVER, CLERK

APPENDIX

Supreme Court of the United States

~~OCTOBER TERM, 1970~~ 1971

No. ~~5338~~ 69-5046

ROBERT APODACA, HARRY MORGAN COOPER, JR., and JAMES ARNOLD MADDEN,

Petitioners,

vs.

OREGON,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF OREGON

PETITION FOR CERTIORARI FILED JUNE 5, 1970
CERTIORARI GRANTED NOVEMBER 9, 1970

Supreme Court of the United States

OCTOBER TERM, 1970

No. 5338

ROBERT APODACA, HARRY MORGAN COOPER, JR., and JAMES ARNOLD MADDEN,

Petitioners,

vs.

OREGON,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF OREGON

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Petitioner Robert Apodaca

Sept. 17, 1968—Indictment filed in Circuit Court of State of Oregon for Marion County.

Oct. 11, 1968—Jury trial of action commenced.

Oct. 11, 1968—Jury returns 11-1 verdict.

Oct. 14, 1968—Petitioner sentenced to 5 years in custody of Oregon Corrections Division.

Dec. 13, 1968—Petitioner files Notice of Appeal.

Dec. 24, 1969—Opinion and judgment of the Oregon Court of Appeals.

Jan. 27, 1970—Letter of Court of Appeals denying Petition for Rehearing.

March 10, 1970—Letter of Supreme Court denying Petition for Review.

Petitioner Harry Morgan Cooper, Jr.

Aug. 12, 1968—Indictment filed in Circuit Court of State of Oregon for Lane County.

Nov. 14, 1968—Jury trial of action commenced.

Nov. 15, 1968—Jury returns 10-2 verdict.

Dec. 23, 1968—Petitioner sentenced to 3½ years in custody of Oregon Corrections Division.

Feb. 19, 1969—Petitioner files Notice of Appeal.

Dec. 24, 1969—Opinion and judgment of the Oregon Court of Appeals.

Jan. 27, 1970—Letter of Court of Appeals denying Petition for Rehearing.

March 10, 1970—Letter of Supreme Court denying Petition for Review.

Chronological List of Relevant Docket Entries

Petitioner James Arnold Madden

Sept. 17, 1968—Indictment filed in Circuit Court of State of Oregon for Lane County.

Dec. 10, 1968—Jury trial of action commenced.

Dec. 10, 1968—Jury returns 11-1 verdict.

Dec. 27, 1968—Petitioner sentenced to 15 years in the Oregon State Penitentiary.

Jan. 15, 1969—Petitioner files Notice of Appeal.

Dec. 24, 1969—Opinion and judgment of the Oregon Court of Appeals.

Jan. 27, 1970—Letter of Court of Appeals denying Petition for Rehearing.

March 10, 1970—Letter of Supreme Court denying Petition for Review.

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MARION

No. 66044

THE STATE OF OREGON, PLAINTIFF

vs.

ROBERT APODACA, DEFENDANT

INDICTMENT—Filed Sept. 17, 1968

ROBERT APODACA is accused by the Grand Jury of the County of Marion and State of Oregon, by this indictment of the crime of ASSAULT WITH A DANGEROUS WEAPON committed as follows:

The said ROBERT APODACA on the 27th day of April, 1968, in the County of Marion and State of Oregon then and there being, and being then and there armed with a dangerous weapon, to wit: a knife, did unlawfully and feloniously assault one Ronald Joe Swanson, by cutting said Ronald Joe Swanson with said dangerous weapon, contrary to the Statutes in such cases made and provided, and against the peace and dignity of the State of Oregon.

Dated at Salem, in the county aforesaid, this 17th day of September, 1968.

* * * *

DEFENDANT'S ARRAIGNMENT AND PLEA—
Filed September 19, 1968

[Caption Omitted in Printing]

On this 19th day of September, 1968, this matter coming on to be heard, the State appearing by Gary D. Gortmaker, District Attorney for Marion County, Oregon, defendant, who now declares his true name to be the

same as heretofore entered, appearing in person and by David Bates, his attorney; wherefore defendant was duly arraigned on an indictment returned by the Grand Jury charging him with the crime of ASSAULT WITH A DANGEROUS WEAPON, reading waived; upon being informed of his rights, defendant enters a plea of NOT GUILTY and the matter is continued for trial, and

IT IS ORDERED that defendant be remanded to the custody of the Sheriff of Marion County, Oregon.

VAL D. SLOPER
Circuit Judge

* * * *

VERDICT--Filed October 11, 1968

[Caption Omitted in Printing]

We, the jury in the above entitled criminal action find the defendant GUILTY of the charge of "Assault with a Dangerous Weapon".

/s/ Robert F. Simon
(foreman)

/s/ Robert W. Robertson

/s/ Velda V. Inglis

/s/ Marjory Woodrum

/s/ Madge M. Boedigheimer

/s/ Patricia A. Zier

/s/ Dorothy J. Brown

/s/ Michael D. Chase

/s/ Vermont Stipper

/s/ Frances J. Holloway

/s/ Juliana Bankston

* * * *

MOTION AND AFFIDAVIT—Filed March 21, 1969

[Caption Omitted in Printing]

Comes now the defendant-appellant and moves the Court for an order supplementing the record herein to include the polling of the jury.

This motion is made pursuant to ORS 19.078(3) and the affidavit attached hereto and by this reference made a part hereof.

Dated this 21st day of March, 1969.

GARY D. BABCOCK
Public Defender
Attorney for Defendant

STATE OF OREGON)
SS.
COUNTY OF MARION)

I, David Bates, being first duly sworn, on oath depose and say that I was the trial attorney for the defendant-appellant herein; that subsequent to the jury's deliberations herein I requested that the jury be polled; that said jury was polled and their vote was eleven to one in favor of guilt; that the parties herein will suffer no prejudice in having the record supplemented to include the aforementioned facts; that said supplementation of the record is necessary in the interests of justice.

DAVID BATES

Subscribed and sworn to before me this 12th day of March, 1969.

EDITH M. BATES
Notary Public for Oregon
My Commission Expires:
8-17-71

* * * *

ORDER—Filed March 24, 1969

[Caption Omitted in Printing]

This matter coming before the Court upon the motion of Gary D. Babcock, defendant's attorney, for an order supplementing the record herein to include the polling of the jury; and it appearing that there is good cause therefore,

IT IS HEREBY ORDERED that the polling of the jury be, and the same is hereby, made a part of the official record on file herein.

Dated this 24th day of March, 1969.

/s/ Douglas L. Hay
Circuit Judge

* * * * *

JUDGMENT—Filed October 14, 1968

[Caption Omitted in Printing]

This matter coming on regularly for trial by jury in the above entitled Court on the 11th day of October, 1968, before the Honorable Douglas L. Hay, Circuit Judge; the defendant appearing in person and with his attorney, David Bates, and the State of Oregon appearing by and in the person of Gary D. Gortmaker, District Attorney for Marion County, Oregon; and

IT APPEARING TO THE COURT from the files and records herein that the defendant, above named, heretofore and on the 19th day of September, 1968, appeared in open Court in person and with his attorney, David Bates, and the State of Oregon appearing by and in the person of Gary D. Gortmaker, District Attorney for Marion County, Oregon, and said defendant was duly arraigned upon an indictment theretofore and on the 17th day of September, 1968, found and filed by the Marion County Grand Jury, charging him, the said defendant,

with the crime of ASSAULT WITH A DANGEROUS WEAPON, committed in Marion County, Oregon, on the 27th day of April, 1968, and when asked by the Court for his plea to said indictment the defendant answered "Not Guilty" and the matter was continued for trial; and

IT FURTHER APPEARING TO THE COURT that on the 11th day of October, 1968, a verdict of "Guilty" was returned by the duly empaneled jury upon the trial of said cause; NOW, THEREFORE,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the defendant, Robert Apodaca, is guilty of the crime of ASSAULT WITH A DANGEROUS WEAPON; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the said defendant be, and he hereby is, committed to the legal and physical custody of the Corrections Division of the Oregon State Board of Control for an indeterminate period of time, the maximum of which is five (5) years.

Dated at Salem, Oregon, this 14th day of October, 1968.

/s/ Douglas L. Hay
Circuit Judge

* * * *

NOTICE OF APPEAL—Filed December 13, 1968

[Caption Omitted in Printing]

TO: THE STATE OF OREGON and GARY D. GORTMAKER, District Attorney for Marion County, Oregon, Attorney for Plaintiff.

Notice is hereby given that the above named defendant, Robert Apodaca, appeals to the Supreme Court of the State of Oregon from the judgment entered in the above

entitled case on the 14th day of October, 1968, and from the whole thereof.

Dated this 13th day of December, 1968.

/s/ Gary D. Babcock
Public Defender
Attorney for Defendant

* * * *

IN THE COURT OF APPEALS
OF THE STATE OF OREGON

No. 21858

STATE OF OREGON, RESPONDENT

vs.

ROBERT APODACA, APPELLANT

OPINION—Filed December 24, 1969

SCHWAB, C. J.

Each of the defendants named, having been found guilty of a felony by a jury, appeals.[1]

The sole contention in each appeal is that under the Constitution of the United States the defendant was entitled to have the jury instructed that to find him guilty the jurors must unanimously agree as to his guilt. This issue has been decided *contra* to the defendants' contention in State v. Gann, —— Or Adv Sh ——, —— Or ——, —— P2d ——, handed down by the Oregon Supreme Court on December 19, 1969.

Affirmed.

[1] None of these appeals involve a first-degree murder conviction.

* * * *

LETTER OF COURT OF APPEALS—Filed January 27, 1970

[Caption Omitted in Printing]

Gary D. Babcock, Esq.
Public Defender
Labor & Industries Building
Salem, Oregon 97310

Re: State v. Robert Apodaca

Dear Mr. Babcock:

I am directed to inform you that the Court has today denied Appellant's Petition for Rehearing in the above entitled matter.

Very truly yours,

/s/ [Illegible]
Clerk

FMS:d
cc: Hon. Gary D. Gortmaker
District Attorney
Marion County Courthouse
Salem, Oregon 97301

* * * *

LETTER OF SUPREME COURT—Filed March 10, 1970

[Caption Omitted in Printing]

Gary D. Babcock
Public Defender
Labor and Industries Building
Salem, Oregon

Re: State v. Robert Apodaca

Dear Mr. Babcock:

I am directed to inform you that the Court has today denied appellant's petition for review in the above matter.

Very truly yours,

/s/ [Illegible]
Clerk

cc: Gary D. Gortmaker
District Attorney
Marion County Courthouse
Salem, Oregon 97301

IN THE CIRCUIT COURT
OF THE STATE OF OREGON
FOR LANE COUNTY

90546

THE STATE OF OREGON, PLAINTIFF

vs.

HARRY MORGAN COOPER, JR., DEFENDANT

INDICTMENT—Filed Aug. 12, 1968

The above named HARRY MORGAN COOPER, JR. is accused by the Lane County Grand Jury by this Indictment of the crime of BURGLARY IN A DWELLING committed as follows:

The said HARRY MORGAN COOPER, JR. on or about the 9th day of June, 1968, in the county aforesaid, did then and there wilfully and unlawfully break and enter the dwelling house of Richard Allan Schun located at 485 Garden Way, Eugene, Oregon, with intent to steal therein; contrary to statute and against the peace and dignity of the State of Oregon.

Dated this 12th day of August, 1968, at Eugene, Lane County, Oregon.

* * * *

PLEA—Filed Aug. 16, 1968

[Caption Omitted in Printing]

This matter coming on before Honorable Edward Leavy, Circuit Judge, this 16th day of August, 1968, the State of Oregon appearing by Stephen Keutzer, Deputy District Attorney for Lane County, Oregon, and the defendant Harry Morgan Cooper, Jr. appearing in person, in custody, and being represented by his attorney, John Meyer, said defendant having been arraigned upon a charge of the crime of "BURGLARY IN A DWELLING", and this

being the time fixed for said defendant to enter his plea. Thereupon said defendant entered his oral plea of "not guilty" to the crime of "BURGLARY IN A DWELLING".

Dated this 16th day of August, 1968.

* * * *

VERDICT—Filed Nov. 15, 1968

[Caption Omitted in Printing]

We, the jury, duly empaneled and sworn to try the above entitled action, find the above name defendant, Harry Morgan Cooper, Jr. guilty of the crime charged in the indictment.

Dated this 15 day of November, 1968.

/s/ Richard Kerns
Foreman

* * * *

TRIAL ENTRY—Filed Nov. 15, 1968

[Caption Omitted in Printing]

Now at this time the above entitled case came on for further trial, present the same as upon adjournment.

Trial proceeded whereupon the witness, Roy Dirks, was examined out of the presence of the jury, and the court having heard the testimony and being fully advised found that the statements made by the defendant to Roy Dirks were freely and voluntarily given and that the defendant had been advised of his rights.

Trial proceeded and during the presentation of the State's case the defendant made motions for mistrial, which were denied by the court.

Trial proceeded, and after hearing all the evidence and argument of counsel, the jury was instructed to retire to consider its verdict. Later in said day, the jury returned into court the following verdict.

(Insert)

Thereupon at the request of counsel, the jury was polled, and the poll of said jury developed ten (10) in favor of said verdict and two (2) opposed to the said verdict.

IT WAS ORDERED, that said verdict be received and filed and the jury discharged from further consideration of said cause.

IT WAS FURTHER ORDERED that time for sentencing be deferred and a pre-sentence investigation ordered. Defendant was remanded to the custody of the Sheriff of Lane County, Oregon.

Dated this 15th day of November, 1968.

* * * *

JUDGMENT—Filed Dec. 23, 1968

[Caption Omitted in Printing]

Now at this time this cause came on to be heard, the State of Oregon appearing by Robert Naslund, Deputy District Attorney for Lane County, Oregon, and the defendant, Harry Morgan Cooper, Jr., appearing in person, in custody, and being represented by John Meyer, his attorney, said defendant having been duly tried and convicted of the crime of "BURGLARY IN A DWELLING" before a jury in the above entitled court and cause and this being the time fixed for sentence herein, and the court being fully advised,

IT IS HEREBY ORDERED AND ADJUDGED that said defendant, Harry Morgan Cooper, Jr., be, and he hereby is sentenced to imprisonment for a term not to exceed three and one-half (3½) years, and he is hereby committed to the legal and physical custody of the Corrections Division of the Oregon State Board of Control, and

IT IS FURTHER ORDERED that the Sheriff of Lane County, Oregon deliver said defendant to the custody of the Superintendent of the Oregon Correctional Institution, and

IT IS FURTHER ORDERED that the State have and recover judgment against the defendant for its costs and disbursements incurred herein, to be taxed, to be paid in the first instance to Lane County, Oregon.

Dated this 23rd day of December, 1968.

/s/ Edwin R. Allen
Circuit Judge

* * * *

NOTICE OF APPEAL—Filed Feb. 19, 1969

[Caption Omitted in Printing]

TO: THE STATE OF OREGON and JOHN B. LEAHY, District Attorney for Lane County, Oregon, Attorney for Plaintiff.

Notice is hereby given that the above named defendant, Harry Morgan Cooper, appeals to the Supreme Court of the State of Oregon from the judgment heretofore entered in the above entitled cause on the 23rd day of December, 1968, and from the whole thereof.

Dated this 17th day of February, 1969.

/s/ J. MARVIN KUHN
Deputy Public Defender
Attorney for Defendant

* * * *

IN THE COURT OF APPEALS OF THE STATE OF OREGON

No. 21966

STATE OF OREGON, RESPONDENT

vs.

HARRY MORGAN COOPER, JR., APPELLANT

OPINION—Filed Dec. 24, 1969

SCHWAB, C. J.

Each of the defendants named, having been found guilty of a felony by a jury, appeals.[1]

The sole contention in each appeal is that under the Constitution of the United States the defendant was entitled to have the jury instructed that to find him guilty the jurors must unanimously agree as to his guilt. This issue has been decided *contra* to the defendants' contention in State v. Gann, —— Or Adv Sh ——, —— Or ——, —— P2d ——, handed down by the Oregon Supreme Court on December 19, 1969.

Affirmed.

[1] None of these appeals involve a first-degree murder conviction.

* * * *

LETTER OF COURT OF APPEALS—Filed Jan. 27, 1970

[Caption Omitted in Printing]

J. Marvin Kuhn, Esq.
Deputy Public Defender
Labor & Industries Building
Salem, Oregon 97310

Re: State v. Harry Morgan Cooper, Jr.

Dear Mr. Kuhn:

I am directed to inform you that the Court has today denied Appellant's Petition for Rehearing in the above entitled matter.

Very truly yours,

FMS:d
cc: Hon. John B. Leahy
District Attorney
Lane County Courthouse
Eugene, Oregon 97401

/s/ [Illegible]
Clerk

* * * *

LETTER OF SUPREME COURT—Filed March 10, 1970

[Caption Omitted in Printing]

J. Marvin Kuhn, Esq.
Deputy Public Defender
Labor & Industries Building
Salem, Oregon

Re: State v. Harry Morgan Cooper, Jr.

Dear Mr. Kuhn:

I am directed to inform you that the Court has today denied appellant's petition for review in the above matter.

Very truly yours,

/s/ [Illegible]
Clerk

cc: Hon. John B. Leahy
District Attorney
Lane County Courthouse
Eugene, Oregon 97401

IN THE CIRCUIT COURT
OF THE STATE OF OREGON
FOR LANE COUNTY

91211

THE STATE OF OREGON, PLAINTIFF

vs.

JAMES ARNOLD MADDEN, DEFENDANT

INDICTMENT—Filed Sept. 17, 1968

The above named JAMES ARNOLD MADDEN is accused by the Lane County Grand Jury by this Indictment of the crime of GRAND LARCENY committed as follows:

The said JAMES ARNOLD MADDEN on or about the 20th day of May, 1968, in the county aforesaid, did then and there wilfully and unlawfully steal $140.00 in United States money, the property of Glen Elwood Haldorson; contrary to statute and against the peace and dignity of the State of Oregon.

Dated this 17th day of September, 1968, at Eugene, Lane County, Oregon.

* * * *

ARRAIGNMENT AND PLEA—Filed Sept. 18, 1968

[Caption Omitted in Printing]

This matter coming on before Honorable Edward Leavy, Circuit Judge, this 18th day of September, 1968, the State of Oregon appearing by John B. Leahy, District Attorney for Lane County, Oregon and the defendant James Arnold Madden appearing in person and being represented by his attorney, Donald Wilson, having been indicted by the Grand Jury of Lane County, Oregon, upon a charge of the crime of "GRAND LARCENY".

Said defendant was then arraigned by having the Indictment read to him in open Court and a true copy thereof, including all endorsements thereon handed to his attorney.

Thereupon said defendant waived time in which to enter his plea and entered his oral plea of "not guilty" to the crime of "GRAND LARCENY".

Dated this 18th day of September, 1968.

* * * *

TRIAL ENTRY AND VERDICT—Filed Dec. 10, 1968

[Caption Omitted in Printing]

Now at this time the above entitled cause came duly on for trial before the Honorable Douglas R. Spencer, the State of Oregon appearing by John E. Moore, Deputy District Attorney for Lane County, Oregon, the defendant, JAMES ARNOLD MADDEN, being present in person, in custody, and being represented by his attorney, Donald Wilson, and the issues herein being joined and this being the time fixed for trial,

IT WAS ORDERED that a jury come, and thereupon the following jurors were duly drawn, examined and sworn to try the said cause:

Walter G. Reck; Edith R. Grabe; Dorothy R. Decker; Maureen E. Mesecher; James D. Blankenship; Anna Ruzicka; Josephine F. Kilwien; Auda M. Thompson, Norine M. Arens; Royal B. Wymer; Oreta B. Wheeler; and Gladys Burk.

Trial proceeded, and the defendant moved to exclude witnesses, which motion was allowed.

Trial proceeded, the State presented opening statement and the defendant waived opening statement.

Trial proceeded, and Deputy Roy H. Dirks and the defendant were examined out of the presence of the jury, and the Court having heard their testimony determined that the statements of the defendant were voluntary.

Trial proceeded, and after hearing all the evidence and argument of counsel, the jury was instructed to retire to consider its verdict. Later in said day, the jury returned the following verdict:

We, the jury, duly empaneled and sworn to try the above entitled action, find the above named defendant, James Arnold Madden Guilty of the Crime charged in the indictment.

Dated 10 day of December 1968.

/s/ James D. Blankenship
Foreman

At the request of counsel for the State the jury was polled, and the poll of the jury developed 11 in favor and 1 opposed to the said verdict. It was ordered that said verdict be received and filed and the jury discharged from further consideration of said cause.

Imposition of sentence was deferred pending receipt of a pre-sentence investigation report previously ordered in Case No. 91212. The State recommended that bail be set in the amount of $2,000.00 and the defendant requested that the release on his own recognizance ordered herein remain in effect. Thereupon, bail was set in the amount of $1,000.00 pending imposition of sentence.

Thereupon, counsel stipulated orally that copies of exhibits A, B and C could be substituted for the originals herein. Mr. Moore is to prepare a stipulation to that effect.

Dated this 10th day of December, 1968.

* * * *

JUDGMENT—Filed Dec. 27, 1968

[Caption Omitted in Printing]

Now at this time this cause came on to be heard, the State of Oregon appearing by John E. Moore, Deputy District Attorney for Lane County, Oregon, and the defendant, JAMES ARNOLD MADDEN, appearing in person, in custody, and being represented by his attorney, Donald Wilson, said defendant having been duly tried and convicted of the crime of "GRAND LARCENY" before a jury in the above entitled court and cause and this being the time fixed for sentence herein, and the Court being fully advised,

IT IS HEREBY ORDERED AND ADJUDGED that said defendant, JAMES ARNOLD MADDEN, be, and he is hereby sentenced to imprisonment for a term not to exceed three (3) years, said sentence to run concurrently with the sentence imposed this date in Case No. 91212 of the Circuit Court of the State of Oregon for the County of Lane in which the defendant was sentenced to imprisonment in the Oregon State Penitentiary for a term not to exceed fifteen (15) years, and he is hereby committed to the legal and physical custody of the Corrections Division of the Oregon State Board of Control, and

IT IS FURTHER ORDERED that the sheriff of Lane County, Oregon deliver said defendant to the custody of the Warden of the Oregon State Penitentiary.

IT IS FURTHER ORDERED that the State have and recover judgment against the defendant for its costs and disbursements incurred herein, to be taxed, to be paid in the first instance to Lane County, Oregon.

DATED this 27th day of December, 1968.

/s/ Douglas R. Spencer
Circuit Judge

* * * *

NOTICE OF APPEAL—Filed Jan. 15, 1969

[Caption Omitted in Printing]

TO: THE STATE OF OREGON and JOHN B. LEAHY, District Attorney for Lane County, Oregon, Attorney for Plaintiff.

Notice is hereby given that the above named defendant, James Arnold Madden, appeals to the Supreme Court of the State of Oregon from the judgment heretofore entered in the above entitled cause on the 27th day of December, 1968, and from the whole thereof.

Dated this 14th day of January, 1969.

/s/ GARY D. BABCOCK
Public Defender
Attorney for Defendant

* * * *

IN THE COURT OF APPEALS
OF THE STATE OF OREGON

No. 21911

STATE OF OREGON, RESPONDENT

vs.

JAMES ARNOLD MADDEN, APPELLANT

OPINION—Filed Dec. 24, 1969

SCHWAB, C. J.

Each of the defendants named, having been found guilty of a felony by a jury, appeals.[1]

The sole contention in each appeal is that under the Constitution of the United States the defendant was entitled to have the jury instructed that to find him guilty the jurors must unanimously agree as to his guilt. This issue has been decided *contra* to the defendants' contention in State v. Gann, —— Or Adv Sh ——, —— Or ——, —— P2d ——, handed down by the Oregon Supreme Court on December 19, 1969.

Affirmed.

[1] None of these appeals involve a first-degree murder conviction.

* * * *

LETTER OF COURT OF APPEALS—Filed Jan. 27, 1970

[Caption Omitted in Printing]

Gary D. Babcock, Esq.
Public Defender
Labor & Industries Building
Salem, Oregon 97310

Re: State v. James Arnold Madden

Dear Mr. Babcock:

I am directed to inform you that the Court has today denied Appellant's Petition for Rehearing in the above matter.

Very truly yours,

FMS:d /s/ [Illegible]
cc: Hon. John B. Leahy Clerk
District Attorney
Lane County Courthouse
Eugene, Oregon 97401

* * * *

LETTER OF SUPREME COURT—Filed March 10, 1970

[Caption Omitted in Printing]

Hon. Gary D. Babcock
Public Defender
Labor and Industries Building

Re: State v. James Arnold Madden

Dear Mr. Babcock:

I am directed to inform you that the Court has today denied appellant's petition for review in the above matter.

Very truly yours,

/s/ [Illegible]
Clerk

cc: Hon. John B. Leahy
District Attorney
Lane County Courthouse
Eugene, Oregon 97401

SUPREME COURT OF THE UNITED STATES

No. 5338, October Term, 1970

ROBERT APODACA, HARRY MORGAN COOPER, JR., and JAMES ARNOLD MADDEN, PETITIONERS

v.

OREGON

On petition for writ of Certiorari to the Court of Appeals of the State of Oregon.

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

November 9, 1970

☆ U. S. GOVERNMENT PRINTING OFFICE: 1970 410372 354

FILE COPY

No. 69-5046

FILED

DEC 31 1970

E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

~~No. 1338~~

ROBERT APODACA, *et al.*,

Petitioners,

v.

STATE OF OREGON,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF OREGON

BRIEF FOR PETITIONERS

GARY D. BABCOCK
110 Labor & Industries Building
Salem, Oregon 97310

RICHARD B. SOBOL
1823 Jefferson Place, N.W.
Washington, D.C. 20036

Attorneys for Petitioners

Of Counsel:

RICHARD T. SEYMOUR
MICHAEL B. TRISTER
ELIZABETH MOLODOVSKY
Washington, D.C.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 5338

ROBERT APODACA, *et al.*,

Petitioners,

v.

STATE OF OREGON,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF OREGON

BRIEF FOR PETITIONERS

I. OPINIONS BELOW

The decision of the Court of Appeals of the State of Oregon in these cases is reported at 89 Ore. Adv. Sh. 939, 462 P.2d 691 (1969), and appears in the printed appendix at pages 8, 14 and 21. There were no opinions in these cases in the Supreme Court of Oregon. (See App. 9, 15, 22). The Supreme Court of Oregon decided the question involved in this case adversely to the contention of petitioners herein in *State v. Gann*, 89 Ore. Adv. Sh. 853, 463 P.2d 570 (1969).

II. STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THE COURT IS INVOKED

The petitioners in each of these cases were convicted of felonies in Circuit Courts of the State of Oregon. In each case, less than unanimous jury verdicts were rendered in accordance with Article I, Section 11 of the Oregon Constitution. In each case, the contention of the petitioner that the Sixth and Fourteenth Amendment to the United States Constitution prohibited a conviction by a divided vote of the jury was rejected on the merits by the Court of Appeals of the State of Oregon (App. 8, 14 and 21), and, in each case, review was denied by the Supreme Court of Oregon (App. 9, 15, 22). The jurisdiction of this Court over this cause is conferred by 28 U.S.C. § 1257(3).

The decisions of the Supreme Court of Oregon declining to review these cases were rendered on March 10, 1970. A motion for leave to proceed *in forma pauperis* and a petition for a writ of certiorari were filed in this Court on June 5, 1970. Both the motion and the petition were granted on November 9, 1970.

III. THE CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This appeal involves the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 11 of the Oregon Constitution.

The Sixth Amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and causes of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Section 1 of the Fourteenth Amendment provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article 1, Section 11 of the Constitution of Oregon provides:

> In all criminal prosecutions, the accused shall have the right to public trial by an impartial jury in the county in which the offense shall have been committed; to be heard by himself and counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process for obtaining witnesses in his favor; provided, however, that any accused person, in other than capital cases, and with the consent of the trial judge, may elect to waive trial by jury and consent to be tried by the judge of the court alone, such election to be in writing; provided, however, that in the circuit court ten members of the jury may render a verdict of guilty or not guilty, save and except a verdict of guilty of first degree murder, which shall be found only by a unanimous verdict, and not otherwise; provided further, that the existing laws and constitutional provisions relative to criminal prosecutions shall be continued and remain in effect as to all prosecutions for crimes committed before the taking effect of this amendment.

IV. THE QUESTION PRESENTED

Does the Sixth Amendment right to trial by jury, as applied to the states by the Fourteenth Amendment, guarantee unanimity in jury verdicts?

V. STATEMENT OF THE CASE

The three petitioners herein, Robert Apodaca, Henry Morgan Cooper, Jr., and James Arnold Madden, were separately convicted of the crimes of assault with a deadly weapon (Ore. Rev. Stat. 163.250), burglary in a dwelling (Ore. Rev. Stat. 164.230), and grand larcency (Ore. Rev. Stat. 164.310), respectively, in Circuit Courts in the State of Oregon. Upon conviction, Apodaca was sentenced to a term of imprisonment up to five years, Cooper up to three and a half years and Madden up to three years. The trial in each case occurred after May 20, 1968, the date of this Court's decision in *Duncan v. Louisiana.*[1] Under the provisions of Article 1, Section 11 of the Oregon Constitution, a jury verdict in cases tried in Circuit Court, other than verdicts of guilty of murder in the first degree, may be rendered by ten members of the twelve-man jury. In the Cooper case, ten members of the jury rendered the verdict, with two jurors in disagreement (App. 11-12). In the Apodaca and Madden cases, verdicts were rendered by eleven jurors, with one juror not concurring (App. 5, 18).

In a consolidated opinion, the Court of Appeals of the State of Oregon rejected petitioners' claims that, by virtue of the provisions of the Sixth and Fourteenth Amendments to the United States Constitution, they could be convicted only upon unanimous jury verdicts (App. 8, 14, 21). In its brief opinion, the Court of Appeals simply followed the recent decision of this issue by a closely divided vote of the Supreme Court of Oregon in *State v. Gann,* 89 Ore. Adv. Sh. 853, 463 P.2d 570 (1969). In each of these cases, review was denied by the Supreme Court of Oregon on March 10, 1970 (App. 9, 15, 22). The sole question pre-

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[1] 391 U.S. 145 (1968). The cases were tried on October 11, 1968, November 14, 1968 and December 10, 1968, respectively. (App. 1-2). In *De Stefano v. Woods,* 392 U.S. 631 (1968), the Court held that the right to jury trial would not be enforced against the states in cases tried prior to the date of the ruling in *Duncan.*

sented for review is whether the Sixth Amendment right to trial by jury, which this Court has held fully applicable to criminal proceedings in state courts, guarantees the right to unanimous jury verdicts.

VI. SUMMARY OF ARGUMENT

The requirement of unanimity is an indispensable ingredient of the trial by jury guaranteed in criminal cases by the Sixth and Fourteenth Amendments. Where the unanimity requirement is abandoned, the nature of trial by jury is drastically altered and the protection afforded a criminal defendant substantially weakened. Specifically,

—Full deliberation by the jury in an effort to reach a common decision is a fundamental characteristic of the jury process, affording an important protection to defendants in criminal cases. Deliberation tends to insure that the jury has considered the views of each of its members; it operates to test the opinions of each juror and to correct any erroneous understanding of the evidence. Where the unanimity requirement is abandoned, jury deliberation ends prematurely when the requisite majority for a verdict is reached. When that majority exists at the outset, there is no deliberation or consideration of dissenting views.

—Jury unanimity is a self-operating mechanism which enforces the due process requirement that guilt be proven beyond a reasonable doubt. It reflects the historic Anglo-Saxon tradition that it is preferable to acquit the guilty than to convict the innocent.

—The unanimity rule furthers the policy that jury panels represent a fair cross-section of the community, by assuring that divergent views and backgrounds are represented in the deliberation and the verdict. In this way it legitimates the imposition of criminal sanctions in the eyes of the community.

These considerations provide the element missing in *Williams v. Florida.*[2] Unlike the requirement of 12, jury unanimity rests on more than "mystical or superstitious insights"; it is closely related "to the great purposes which gave rise to the jury in the first place."[3]

In other respects, there is a far stronger case for interpreting the Sixth Amendment to require unanimity than there was in *Williams* to require 12 jurors. There is substantial historical evidence of the intention of the framers that the unanimity requirement be secured by the Sixth Amendment. Moreover, there is widespread national adherence to the unanimity requirement. Only two states, Oregon and Louisiana, provide for less than unanimous jury verdicts in serious criminal cases; two others provide for non-unanimous jury verdicts in a group of cases punishable by up to one year in prison. By contrast, at least 12 states provide for juries of less than 12.[4] Both because of the lesser number of jurisdictions involved and because of the greater ease of complying with a unanimity requirement than with a requirement of 12, the practical difficulties of implementing compliance, which troubled the Court in *Williams*, are not a significant factor here. Especially in the absence of substantial practical problems, retention of the unanimity requirement is far preferable to a decision that will necessarily create uncertainty concerning the validity of different state practices involving various combinations of jury and majority size.

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[2] 399 U.S. 78 (1970).

[3] 399 U.S. at 88, 89-90.

[4] See note 45, *infra*, and accompanying text.

VII. ARGUMENT

THE SIXTH AMENDMENT GUARANTEES UNANIMITY IN JURY VERDICTS.

In *Williams v. Florida, supra,* the Court held that the Sixth Amendment does not guarantee a jury of 12 in criminal cases.[5] The Court noted that a jury of 12 was firmly established at common law[6] and had been repeatedly recognized as an element of the Sixth Amendment right,[7] but upon reconsideration of the question held that only those characteristics of the common law jury that have a strong functional relationship to the historic purposes of jury trial are secured by the Sixth Amendment.[8] The twelve-man requirement was found not to meet this test.

This case involves an issue expressly left open in *Williams* –whether the Sixth Amendment guarantees unanimity in the jury verdict.[9] The requirement of unanimity, like the requirement of 12 jurors, is firmly rooted in common law

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[5]The Court held in *Duncan v. Louisiana,* 391 U.S. 145 (1968), and reaffirmed in *Baldwin v. New York,* 399 U.S. 66 (1970), that the Sixth Amendment jury trial right is fully applicable in state criminal cases, by virtue of the Fourteenth Amendment.

[6]399 U.S. at 86-90.

[7]*Id.* at 90-92.

[8]*Id.* at 99-100.

[9]*Id.* at 100, n. 46. See also *Duncan v. Louisiana, supra,* 391 U.S. at 158, n. 30.

history[10] and in the decisions of this Court.[11] But unlike a jury of 12, unanimity is essential to achieving the purposes of the jury in criminal cases. Moreover, there are additional strong considerations that were not present in *Williams* which favor the retention of the unanimity requirement. There is strong support for the conclusion that the framers of the Bill of Rights intended to incorporate the unanimity requirement in the Sixth Amendment jury trial guarantee. Further, there is close to universal adherence in the American states to the unanimity requirement in jury trials. Lastly, practical considerations favor the retention of the unanimity requirement.

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[10] In *Anonymous Case*, 41 *Lib. Assisarum* 11 (1367), the justices of assize decided that they could not accept an 11 to 1 guilty verdict, where the twelfth juror refused to agree to the defendant's guilt, saying that he would rather die in prison first. This case has been widely cited in treatises on the common law, and has been reprinted in English in R. Pound and T. F. Plucknett, *Readings On the History and System of the Common Law* (1927) (translated by Thayer) at 155-56.

The authors of the common law treatises all recognized the requirement of unanimity. See Sir Matthew Hale, *The History of the Common Law of England* (1713) at 261 and 263; 2 Sir Matthew Hale, *Historia Placitorum Coronae* (1736) at 297 and 309; 3 Blackstone, *Commentaries On the Laws of England* (1765) at 375-76 and 4 *Commentaries* at 349 and 360; 1 J. Chitty, *A Practical Treatise on the Criminal Law* (1816) at 635-36; 3 J. Story, *Commentaries on the Constitution of the United States* (1833) at 652.

[11] See *Andres v. United States*, 333 U.S. 740 (1948); *Thompson v. Utah*, 170 U.S. 343 (1898) (dictum); *Patton v. United States*, 281 U.S. 276, 288 (1930) (dictum); *cf. American Publ. Co. v. Fisher*, 166 U.S. 464, 468 (1897) (unanimity in civil juries secured by the Seventh Amendment); *Springville v. Thomas*, 166 U.S. 707 (1897) (same).

A. Unanimity Performs Indispensable Functions In Terms of the Historic Purposes of the Criminal Jury.

In several respects relaxation of the rule of unanimity drastically alters the nature of trial by jury and weakens the protection the jury has historically afforded a criminal defendant.

1. *The Unanimity Requirement Assures Full and Complete Jury Deliberation.*

The historic role of the jury in Anglo-American criminal law is to hear the evidence, receive instructions on the law, and deliberate collectively in an effort to reach a common decision. "The very object of the jury system is to secure unaninity by a comparison of views and by arguments among jurors themselves." *Allen v. United States,* 164 U.S. 492, 501 (1896). While trial by jury entrusts to a group of laymen grave decisions affecting life and liberty, the integrity of their decisional process has been assured by requiring that the views of each juror be examined and tested by the other jurors in the give and take of the deliberative process:

> One advantage resulting from the rule [of unanimity] no doubt is that if any one juror dissents from the rest, his opinion and reasons must be heard and considered by them. They can not treat these with contempt or indifference, for he has an absolute veto upon their verdict, and they must convince him or yield themselves, unless they are prepared to be discharged without delivering any verdict at all. This furnishes a safeguard against precipitancy and insures a full and adequate discussion of every question which can fairly admit of doubt.

W. Forsyth, *History of Trial by Jury* 204 (2d Ed. Morgan 875).

> The importance of this comparison and discussion is particularly great in the case of untrained

> judges . . . . [T]he verdict ultimately represents general impressions founded on conclusions, of which many are forgotten in the course of the trial; and though the value of such general impressions is often underrated, there can be no doubt that their importance depends, if not principally, at least to a great extent, on their being checked by and compared and found to correspond with, the general impressions of others.

J. F. Stephen, *A General View of the Criminal Law of England* 221 (1863). See also *United States v. Fioravanti*, 412 F.2d 407, 417-18 (3d Cir. 1969).

Jury deliberation, as encouraged by unanimity, operates to offset appeals to passion and prejudice by providing a safeguard against hasty verdicts[12] based on emotion rather than evidence.[13] The unanimity rule thus protects against oppressive prosecutions based upon popular prejudice—one of the great purposes behind the guarantee of jury trial in the Sixth Amendment. See *Duncan v. Louisiana, supra*, 391 U.S. at 155.[14]

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[12] Justice Goodwin, dissenting in *State v. Gann*, 83 Ore. Adv. Sh. 853, 462 P.2d 570 (1969), reproduced in Appendix B to the petitions for certiorari herein, stated that the unanimity rule:

> undoubtedly decreases the likelihood of precipitancy and increases the opportunity for a full and adequate discussion of every issue about which there is reasonable doubt.

Appendix B at 32.

[13] This danger is particularly acute because of the nature of the jury as a body of completely untrained factfinders. Although a large measure of the value of jury trial lies in just this fact, see 3 J. Story, *Commentaries On the Constitution* (1833) at 653; 4 Blackstone, *Commentaries* at 349, it creates a danger in that untrained laymen are far more susceptible to appeals to passion and to prejudice than are judges. See *Marshall v. United States*, 360 U.S. 310 (1959); *Turner v. State of Louisiana*, 379 U.S. 466 (1965).

[14] In 1833, for example, Justice Story warned of the difficulty of ensuring that innocent persons are not unjustly convicted by juries when there is "a spirit of violence and vindictiveness on the part of

When a majority can render a verdict, the process of deliberation is undercut in two respects. First, if the requisite number of jurors agree at the outset, there will be no deliberation at all. In these cases, the minority jurors, who may be the most capable and intelligent members of the jury and who may remember a point of evidence that would have been convincing to the majority, will never be heard. See Comment, *Should Jury Verdicts be Unanimous in Criminal Cases,* 47 Ore. L. Rev. 417, 424 (1968).

Second, even when a requisite number of jurors do not agree at the outset and some deliberation is required, that process is prematurely cut off once the necessary majority agrees on a verdict. In at least 25% of the criminal cases in Oregon, split verdicts are rendered.[15] The very fact that there are dissenting jurors in these cases who feel strongly enough to report their disagreement indicates that these are the cases in which there is serious question as to the guilt or innocence of the accused.[16] But notwithstanding the special need for careful consideration of the evidence in just such cases, when ten jurors agree deliberation stops and the verdict is rendered.[17] The value of deliberation to the point of a consensus, with the attendant possibility that the majority may be swung over in the continuing examination, is lost.

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the people [who] . . . may demand their victim with a clamorous precipitancy." 3 *Commentaries on the Constitution* at 653. Similarly, J. F. Stephen, in his study of the English criminal process, stated, *inter alia,* that he thought "popular prejudice" in the jury room could influence a large majority of the jurors. J.F. Stephen, *A General View of the Criminal Law of England* (1863) at 222.

[15]Kalven & Zeisel, *The American Jury: Notes For an English Controversy,* 48 Chi. Bar Rec. 195, 201 (1967).

[16]W. Forsyth, *History of Trial by Jury, supra,* at 204-205, 210.

[17]Kalven & Zeisel, *The American Jury: Notes For an English Controversy,* 48 Chi. Bar Rec. 195, 201 (1967).

In jurisdictions in which the unanimity requirement prevails, the jury deadlocks in only 5.6% of the cases.[18] Thus, it is plain that Oregon juries render divided verdicts in a large number of cases in which a unanimous verdict could be reached after further deliberation. In some of these cases, the minority might have convinced the majority of the correctness of its views. In others, a middle ground would have been agreed upon, involving a conviction of a lesser included offense or of less than all the counts charged. But even where full deliberation would have resulted in the same verdict, the completion of the process would have provided an important safeguard against an erroneous decision.

2. *The Unanimity Requirement Serves to Assure a Higher Standard of Proof in Criminal Cases.*

As the Court suggested in *Williams,*[19] the unanimity requirement helps insure that the government bear a heavier burden of proof in criminal cases and thus protects against the conviction of innocent persons.

The Court has held that due process of law prohibits criminal convictions except upon proof of guilt beyond a reasonable doubt.

> The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction. Accordingly, a society that values the good name and freedom of every individual should not condemn a man for commission of a crime when there is reasonable doubt about his guilt.

In re Winship, 397 U.S. 358, 363-64 (1970).

The unanimity requirement assures that this standard of guilt is actually applied.

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[18] *Id.* at 200 Kalven & Zeisel, *The American Jury,* 453, 461 (1966).

[19] 399 U.S. at 100 n. 46.

> The unanimity of a verdict in a criminal case is inextricably interwoven with the required measure of proof. To sustain the validity of a verdict by less than all the jurors is to destroy this test of proof for there cannot be a verdict supported by proof beyond a reasonable doubt if one or more jurors remain reasonably in doubt as to guilt. It would be a contradiction in terms.

Hibdon v. United States, 204 F.2d 834, 838 (6th Cir. 1953). *Accord: United States v. Fioravanti,* 412 F.2d 407, 418-19 (3d Cir. 1969); *Billeci v. United States,* 184 F.2d 394, 403 (D. C. Cir. 1950).[20]

In another respect, the unanimity requirement serves to enforce the standards of guilt in criminal cases. Jurors are laymen unschooled in the law. Verbal distinctions between guilt beyond a reasonable doubt and guilt by a preponderance of the evidence frequently become blurred and some jurors will vote to convict if they believe the evidence of guilt outweighs the evidence of innocence.[21] By contrast, the unanimity requirement is a self-operating mechanism which gives substance to the standard of guilt beyond a reasonable doubt.[22] Even if some individual jurors actually apply a standard less rigorous than that instructed by the

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[20]It is a safe and most valuable principle of criminal law that before a person should be convicted of an offense; and deprived of the most sacred rights a man can enjoy, life and liberty, there should be proof of his guilt beyond all reasonable doubt, and if, when the facts and evidence are placed before twleve men who, we must presume, are conscientious, a single one of them has a doubt of the person's guilt, this ought to be sufficient to prevent a conviction. Proffatt, *A Treatise on Trial by Jury* 117 (1876).

[21]*Cf. In re Winship, supra,* 397 U.S. at 369-70 (Harlan J., Concurring); Kaplan, *Decision Theory and the Fact-Finding Process,* 20 Stan. L. Rev. 1065, 1071-77 (1968).

[22]*Cf. In re Winship, supra,* at 363.

> The reasonable-doubt standard . . . provides concrete substance for the presumption of innocence . . . .

Court, where all the jurors are required to reach the same conclusion, a stringent standard—whether or not it can be precisely categorized as guilt beyond a reasonable doubt—has nevertheless been met.

In *Williams*, the Court considered whether the reduction of the number of jurors from 12 to 6 reduced the government's burden of proof in criminal cases:

> What few experiments have occurred—usually in the civil area—indicate that there is no discernible difference between the results reached by the two different-sized juries. In short, neither currently available evidence nor theory suggests that the 12-man jury is necessarily more advantageous to the defendant than a jury composed of fewer members.[23]

By contrast, both evidence and theory make plain that the unanimity requirement is more advantageous to a criminal defendant than a rule permitting less than unanimous verdicts, and that the unanimity rule provides an important protection against erroneous criminal verdicts.[24]

It is obvious that it is harder to convince all of the jurors than some of the jurors that a defendant is guilty beyond all reasonable doubt. Where there are dissenters on a given record, more and better proof would have convinced them. To accept a verdict over their dissent in these cases reduces the applicable standard of proof.[25]

By contrast with the 5.6% figure of hung juries in unanimous verdict jurisdictions, where unanimity is not required

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[23] 399 U.S. at 101-02.

[24] See the dissenting opinion of Justice Goodwin in *State v. Gann, supra,* Appendix B to the Petition for Certiorari herein at 32.

[25] Justice Goodwin reached the same conclusion in his dissent in *State v. Gann, supra,* Appendix B at 33:

> Thus, because it requires the concurrence of the unimpassioned and the unprejudiced, the protection of unanimity increases the likelihood that the guilt of the accused will truly be established beyond a reasonable doubt.

3.1% of the criminal juries fail to reach verdicts.[26] Thus, in 2½% of the criminal trials in Oregon, a split verdict is rendered, although the jury would have hung under the common law standard. These are cases in which a verdict is rendered, but in which further deliberation would not have brought the dissenting jurors to vote with the majority. Recent evidence indicates that one or two jurors will indefinitely resist the powerful verbal and psychological pressures toward concurrence in the view of the majority only where there were other jurors in support of their position at the outset of deliberation.[27] In these situations, where the convictions of one or two dissenting jurors were originally supported by others and are so deep-rooted that the pressures toward unanimity arising out of prolonged deliberation are resisted, it is the historic judgment that guilt beyond a reasonable doubt has not been established and that the case not be decided.

> The most likely explanation for the 10:2 or 11:1 deadlocked juries is that it is a response to genuine difficulties in the case. . . ."[28]

"The possibility of a hung jury is as much a part of our jury unanimity schema as are verdicts of guilty or not guilty." *United States v. Fioravanti, supra,* 412 F.2d at 416. "[F]ailure to agree . . . is, at least momentarily, a victory for the defense and a legitimate end of the trial." *Hoffman v. United States,* 297 F.2d 754, 758 (5th Cir. 1962) (Brown, J., dissenting).

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[26]Kalven & Zeisel, *The American Jury* 461 (1966).

[27]*Id.* at 462; Note, On Instructing Deadlocked Juries, 78 Yale L. J. 100, 107-113 (1968).

[28]Kalven & Zeisel, *The American Jury: Notes For An English Controversy,* 48 Chi. Bar Rec. 195, 201 (1967). See Note, *On Instructing Deadlocked Juries,* 78 Yale L. J. 100, 129 (1968). See also J. F. Stephen, *supra,* at 222:

> A minority which retains its opinion after . . . deliberation is not much less likely to be right than a majority.

Because it allows convictions in situations in which the jury would otherwise deadlock, a lessening of the unanimity requirement results in an unmistakable lessening of the burden of proof. And given the care with which our legal system attempts to avoid the possibility of convicting the innocent[29] two or three cases in a hundred is a very substantial number in which to incur a substantial additional risk of erroneous convictions.[30]

In maintaining a very high standard of proof in criminal cases, the unanimity requirement assures the community that innocent men are rarely convicted of crimes.[31] This assurance will erode if, in one case after another, a judgment of a conviction is entered where one or more jurors are convinced of the innocence of the accused.

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[29] See *In re Winship, supra,* 397 U.S. at 363-64. In 1736, Sir Matthew Hale stated:

> . . . [T]he best rule is *in dubiis* rather to incline to acquittal than conviction.

1 *Historia Placitorum Coronae* at 509. See also *id.*, at 300. See also J. Proffatt, *supra,* at 117.

[30] In *Williams,* the Court pointed out that a lessening of historic standards for the jury process may make acquittals easier to obtain as well as convictions. 399 U.S. at 101. But a case in which the jury is divided 10-2 in favor of the accused is in practical terms virtually the equivalent of an acquittal—in these circumstances retrial is unlikely and ultimate conviction even more so. On the other hand, where the jury is divided 10-2 in favor of conviction, the practical difference to the defendant between a unanimity rule and a rule of 10 may be very great.

[31]

> It is critical that the moral force of the criminal law not be diluted by a standard of proof which leaves people in doubt whether innocent men are being condemned. It is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper factfinder of his guilt with utmost certainty.

In re Winship, supra, 397 U.S. at 364.

> The chief point in favor of the rule [of unanimity], however, is that, on the average, its application is bound to bring a greater degree of general satisfaction and public contentment . . . Courts are constituted not only to determine individual cases, but, by furnishing an organized means of adjustment, to maintain the tranquility of society; and it seems plain that the average litigant, or accused defendant . . . when he knows that twelve of his fellow men have united in its decision, will accept the verdict with much better grace than one reached by a split jury, as also will the community at large. This, probably more than any other reason accounts for the origin and long continuance of the unanimity rule.

von Moschzisker, *Trial by Jury* 299-300 (1930).

Society's confidence in the integrity of the criminal process should not be compromised in favor of the marginal convenience of permitting non-unanimous verdicts.

3. *The Unanimity Requirement Guarantees Meaningful Representation of a Cross-Section of a Community.*

There is a long line of decisions in this Court securing the principle that a criminal jury must be drawn from a jury panel that reflects a true cross-section of the community. *E.g., Whitus v. Georgia,* 385 U.S. 545 (1967); *Smith v. Texas,* 311 U.S. 128 (1940); *Norris v. Alabama,* 294 U.S. 587 (1935); *Strauder v. West Virginia,* 100 U.S. 303 (1880).

The cross-section requirement serves several purposes in criminal jury trials. The variety of perspectives it produces on the jury helps to ensure the soundest possible evaluation of the credibility of witnesses and assessment of guilt. It guarantees the accused that his guilt will not be determined by a group from which his peers have been systematically

excluded. It legitimates, in the eyes of all parts of society, the imposition of criminal sanctions.[32]

Jury unanimity is a necessary procondition to the effective application of the cross-section requirement. While members of racial, religious or ethnic minorities, women, poor people, young people or other previously excluded groups may now be represented on juries, a rule permitting a less than unanimous verdict makes it possible for a verdict to be rendered without their acquiescence and indeed without the consideration of their views. Only where a verdict cannot be rendered over the objection of any juror does the cross-section requirement assure a broad community consensus for the imposition of criminal sanctions, and thereby assure that the jury will perform its constitutional function as a check on official oppression. See *Duncan v.*

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[32]Kuhn, *Jury Discrimination: The Next Phase*, 41 S. Cal. L. Rev. 235, 241-247 (1968); Tucker, *Racial Discrimination in Jury Selection in Virginia*, 52 Va. L. Rev. 736, 742-745 (1966); Kalven and Zeisel, *The American Jury, supra*, 210-213; Note, *The Jury: A Reflection of the Prejudices of the Community*, 20 Hastings L. J. 1417-20 (1969); Note, *Community Hostility and the Right to an Impartial Jury*, 60 Colum. L. Rev. 349, 349-50 (1960).

Sir Matthew Hale said of trial by jury:

> . . . It has the unanimous Suffrage and Opinion of Twelve Men, which carries in itself a much greater Weight and Preponderation to discover the Truth of a Fact than any other Trial whatsoever.

The History of the Common Law of England (1713) at 263.

Cf. Witherspoon v. Illinois, 391 U.S. 510, 519-520 (1968). In stressing the importance of including persons of varying viewpoints on a jury, so that it may "express the conscience of the community," *id.* at 519, the Court observed:

> [O]ne of the most important functions any jury can perform . . . is to maintain a link between contemporary community values and the penal system—a link without which the determination of punishment could hardly reflect "the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 . . . .

Id. at 519, n. 15.

Louisiana, supra, 391 U.S. at 155, 158; *Williams v. Florida, supra,* 399 U.S. at 100.

B. There is a Broad National Acceptance of the Unanimity Requirement in Criminal Jury Trials.

In federal courts and in the courts of 46 states, unanimity is secured in the trial of all criminal cases to which the federal jury trial right applies. In two other states, Montana and Oklahoma, less than unanimous verdicts are permitted for a handful of crimes punishable by up to one year in prison.[33] Only in Oregon and Louisiana can less than unanimous jury verdicts be rendered in the trial of offenses punishable by over a year's imprisonment.[34] Even

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[33] Montana permits a verdict of two-thirds of the jury in misdemeanor cases. The jury may consist of any number less than twelve in any case involving less than a capital offense, upon the agreement of the parties and the consent of the court. In the justice or police court, the jury consists of six at most, and less if the parties agree to a smaller number of jurors. Although misdemeanors are ordinarily punishable by no more than six months' imprisonment, there are exceptions for a few offenses. MONT. CONST., art. 3, § 23; MONT. REV. CODES ANN. §§ 94-116, 95-1901(c), 95-1915(a), 95-2005, 95-2006(a).

Oklahoma permits a verdict by three-fourths of the jury in misdemeanor cases. A misdemeanor jury is composed of six persons. Misdemeanors are generally punishable by imprisonment of up to one year. OKLA. CONST., art. 2, § 19 (1970-71 Supp.); OKLA. STAT. ANN., tit. 21, § 10.

[34] Oregon permits a majority verdict by ten out of twelve jurors in all felony cases except first degree murder, although it requires unanimity in first degree murder trials and all petty and misdemeanor cases tried in district court. ORE. CONST., art. 1, § 11; ORE. REV. STAT. 136.610.

Louisiana permits a majority verdict by nine out of twelve jurors in all non-capital cases where punishment is necessarily at hard labor, although it requires a unanimous verdict by a jury of twelve in capital cases, and by a jury of five where punishment may be at hard labor. LA. CONST., art. 7, § 41; CODE OF CRIM. PROC., art. 782.

The failure of both states to provide for unanimity in trials involving non-capital serious felonies, while requiring it for all lesser and

in these two states, unanimity is required in capital cases, thus indicating a legislative recognition that, at least where life is at stake, the imposition of penalties is improper without the greater security of a unanimous verdict.[35]

In *In re Winship*, which involved the standard of guilt beyond a reasonable doubt in criminal cases, this Court indicated the constitutional significance of widespread adherence to a traditional rule of criminal procedure:

> Although virtually unanimous adherence to the reasonable doubt standard in common law jurisdictions may not conclusively establish it as a requirement of due process, such requirement does "reflect a profound judgment about the way in which the law should be enforced and justice administered." *Duncan v. Louisiana*, 391 U.S. 145, 155 (1968).

397 U.S. at 361-362.

Similar considerations strongly support the recognition of jury unanimity as a Sixth Amendment requirement.[36]

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greater offenses, raises a serious question whether the distinctions are arbitrary and capricious, and hence deny equal protection of the laws to those convicted by non-unanimous juries. See generally *Shapiro v. Thompson*, 394 U.S. 618 (1969).

[35] The fact that over half the states now allow civil verdicts by less than unanimous juries, see Note, *On Instructing Deadlocked Juries*, 78 Yale L. J. 100, 127 n. 2 (1968), while 48 states require unanimity for felony convictions, further illustrates broad recognition of the importance of this additional safeguard against error in criminal cases.

[36] Petitioners' argument in this case is framed in terms of the Sixth Amendment. It is plain, however, that many of the considerations discussed herein, including the relationship of jury unanimity to the reasonable doubt standard and to jury cross-section requirements, are equally relevant to the interpretation of the due process and equal protection clauses of the Fourteenth Amendment, unassisted by the Sixth Amendment. Thus, even if the holding in *Duncan* that the Fourteenth Amendment applies the Sixth Amendment jury trial right to state criminal proceedings is not accepted, see *Williams v. Florida*, *supra*, 397 U.S. at 117 (Harlan, J., concurring), 143 (Stewart, J., concurring), there is nonetheless a strong basis in the general language of the Fourteenth Amendment for the requirement of unanimity in criminal jury trials.

C. The Legislative History of the Sixth Amendment Supports the Conclusion That Congress Intended to Incorporate the Right to a Unanimous Verdict in the Guarantee of Jury Trial.

In *Williams*, the Court held that the legislative history of the Sixth Amendment failed to indicate whether or not the framers intended to incorporate the requirement of 12 jurors. 399 U.S. at 92-99. There is additional evidence with respect to the unanimity requirement which strongly indicates an intention of the framers of the Bill of Rights to incorporate that guarantee in the Sixth Amendment.

North Carolina refused to join the Union until certain specified individual rights, including the right to unanimous jury verdicts in criminal trials[37], had been guaranteed by the Congress.[38] The interrelationship between the passage of a

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[37]North Carolina's proposed Declaration of Rights stated in part:

> 8th. That, in all criminal and capital prosecutions, a man hath a right . . . to a fair and speedy trial by an impartial jury of his vicinage, without whose unanimous consent he cannot be found guilty . . . .

4 J. Elliot, *Debates In the Several State Conventions on the Adoption of the Federal Constitution, and Journal of the Federal Convention* (2nd ed., 1836) (hereinafter cited as Elliot's *Debates*) at 243. The provision in Virginia's proposed Bill of Rights was identical. 3 Elliot's *Debates* at 658, § *.

[38]The North Carolina Convention stated in a resolution adopted August 2, 1788, that "this Convention has thought proper neither to ratify nor reject the Constitution proposed for the government of the United States," despite the Convention's recognition that, the necessary number of states having ratified the Constitution, the Federal Government would begin its operations without them. 4 Elliot's *Debates* at 251.

On the same day, the Convention adopted a Declaration of Rights, *id.*, which included the unanimity provision, *supra*, n. 37, and was prefaced by the following statement:

> Resolved, That a declaration of rights, asserting and securing from encroachment the great principles of civil and religious liberty . . . ought to be laid before Congress, and the convention of the states that shall or may be called for the

Bill of Rights and the willingness of some colonies to join the Union was emphasized in the debate on the Bill of Rights in the First Congress.[39] James Madison stated the purpose of the Bill of Rights was to quiet the fears of those who thought that the Constitution had not adequately safeguarded various rights, including the right to trial by jury.[40] Representative Gerry stated in debate that the objections of North Carolina and Rhode Island would have to be met before they came into the Union.

> Are gentlemen willing then to throw Rhode Island and North Carolina into the situation of foreign nations? They have told you that they cannot accede to the Union, unless certain amendments are made to the Constitution; if you deny a compliance with their request in that particular, you refuse an accommodation to bring about that desirable event, and leave them detached from the Union.[41]

Since the chief purpose of the Bill of Rights was to quiet fears that individual rights were insufficiently protected, it follows that North Carolina's expressed apprehension concerning the elimination of unanimity in jury verdicts was intended to be alleviated by the Sixth Amendment.[42] Only

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> purpose of amending the said Constitution, previous to the ratification of the Constitution aforesaid on the part of the state of North Carolina.

Id. at 242.

[39]North Carolina had transmitted the above resolutions and Declaration of Rights to Congress and to each State. 4 Elliot's *Debates* at 252.

[40]1 *Annals of Congress* 746 (1834).

[41]1 *Annals* 445. There is evidence that some of the States which ratified the Constitution had done so because of assurances that the same types of safeguards sought by North Carolina would be provided. Compare Virginia's proposed bill of rights, *supra* note 37, with the statement of Rep. Gerry, 1 *Annals* at 447.

[42]The Ninth Amendment to the United States Constitution, which provides that "the incorporation in the Constitution of certain rights shall not be construed to deny or disparage others retained by the

after the adoption of the Bill of Rights by the Congress did North Carolina join the Union.[43] In contrast to this concern that jury unanimity be guaranteed, the number of jurors does not seem to have troubled any of the states during the ratification process.

D. Practical Considerations Favor the Retention of the Unanimity Requirement.

In contrast to the near uniform nationwide practice with respect to jury unanimity[44], at least twelve states provide for juries of less than twelve in the trial of criminal cases[45] to which the federal jury trial right applies. Thus, unlike the situation in *Williams*, retention of the common law standard would affect only a small handful of jurisdictions. Moreover, even within those few jurisdictions the transition from a non-unanimous to a unanimous rule can be simply carried out. No change need be made in the numbers of jurors available for duty or actually impaneled, or in the size of jury boxes or other facilities. Only the judge's instruction to the jury would have to be changed.

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people" certainly prohibits the inference that the mere lack of specification of the unanimity requirement in the Sixth Amendment suggests it was not guaranteed. The Ninth Amendment was introduced specifically to preclude inferences of this kind that might otherwise be drawn from the skeletal form of the Bill of Rights. 1 *Annals* at 439; 1 *Annals* at 442; see also *The Federalist Papers*, No. 83; Remarks of C. C. Pinckney in the South Carolina House of Representatives on the Ratification of the Constitution, 3 M. Farrand, *Records of the Federal Convention of 1787* (1911) at 256; Remarks of James Wilson in the Pennsylvania Convention, 3 Farrand's *Records* at 143.

[43] 2 *Annals* at 1714.

[44] See Section B, *supra.*

[45] The authorities are collected in an Appendix to Justice Harlan's concurring opinion in *Williams*, 399 U.S. at 139-141, and in Appendix B to the Brief for the Appellant in *Duncan v. Louisiana, supra.*

While the unanimity requirement will cause greater length of deliberation in many criminal cases—a phenomenon that petitioners believe provides an important consideration in favor of its retention—the jury will be deadlocked only in an additional two or three per cent of criminal cases.

A fixed requirement of twelve jurors would have permanently and inflexibly imposed on state criminal systems a burdensome and expensive procedure that the Court in *Williams* found was without substantial purpose in terms of the historic role of the jury. Unanimity serves important functions and the practice of 48 states demonstrates that its retention would impose on substantial additional burdens on the administration of criminal justice.

Another practical consideration supports the retention of the unanimity requirement. In Louisiana, nine out of twelve jurors can return a verdict in serious criminal cases.[46] In Montana, two-thirds of the jury can return a verdict in a class of cases to which the Sixth Amendment right to a jury trial applies.[47] Approval of a verdict supported by ten of twelve jurors will raise the questions of whether these lesser majorities—or even a verdict returned by a simple majority of jurors—comports with the essential requirement of trial by jury. Further difficulties will arise when majority verdicts are combined with the juries of less than twelve members approved last Term.[48] Given *Williams*, a decision permitting less than unanimous verdicts may soon confront the Court with a myriad of different combinations of jury size and required majority, raising difficult line-drawing problems. Until those problems are resolved, such a deci-

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[46] See note 33, *supra.*

[47] See note 34, *supra.*

[48] Oklahoma, for example; permits jury verdicts by 3/4 of a six-man jury in some cases punishable by up to one year in prison. See note 33, *supra.*

sion will create serious uncertainty in the administration of the criminal law.

VIII. CONCLUSIONS

The requirement of unanimity in criminal jury verdicts is grounded in several hundred years of practice in this country and at common law. It has been long recognized by this Court as a constitutionally guaranteed feature of the Sixth Amendment right to trial by jury in criminal cases. It has always been considered to bear a strong relationship to the purposes of the jury system. There are no compelling circumstances which might justify the abandonment of this basic guarantee.

Petitioners respectfully urge their convictions be reversed or remanded for a new trial in accordance with the unanimity requirements of the Sixth Amendment.

Respectfully submitted,

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JAN 30 1971
E. ROBERT SEAVER, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1970

~~NO. 5888~~

ROBERT APODACA, et al.,

Petitioners,

v.

STATE OF OREGON,

Respondent.

On Writ of Certiorari to the Court of Appeals of Oregon

BRIEF FOR RESPONDENT

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Appendix: *State of Oregon v. Gann* 33

In the Supreme Court of the United States

OCTOBER TERM, 1970

NO. 5338

ROBERT APODACA, et al.,

Petitioners,

v.

STATE OF OREGON,

Respondent.

On Writ of Certiorari to the Court of Appeals of Oregon

BRIEF FOR RESPONDENT

I. OPINIONS BELOW

Petitioners' recital is correct. The current citation for *State v. Gann* is 254 Or 549, 463 P2d 570 (1969).

II. JURISDICTIONAL STATEMENT

III. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

IV. THE QUESTION PRESENTED

V. STATEMENT OF THE CASE

Petitioners' statements of the jurisdiction of the court, the constitutional provisions involved, the question presented and the case, are accurate and respondent accepts them as its own.

VI. SUMMARY OF ARGUMENT

The Oregon law permits convictions in felony cases by a vote of ten of twelve jurors. That procedure is authorized by the Sixth and Fourteenth Amendments for these reasons:

I. Unanimity is not a necessary element of the Anglo-American jury system—

A. Because the unanimity requirement is an historical accident;

B. Because unanimity is no longer required in England and certain other Commonwealth jurisdictions;

C. Because the Anglo-American system has encouraged and accepted the illusion, not the reality, of unanimous verdicts; acceptance of substantial majority verdicts is more effective, less fictitious than other accepted devices; and

D. Because distinguished American legal groups have endorsed adoption of the substantial majority verdict procedure and five American states have modified the unanimity requirement.

II. Unanimity is not required by the Sixth Amendment because it was omitted from the Constitution and specifically deleted from the Sixth Amendment.

III. Unanimity is not required by the Sixth Amendment because it is not essential to the purpose of trial by jury—

A. Because a 10/12 verdict requirement is an adequately substantial shield against judicial or prosecutorial oppression;

B. Because 10/12 verdicts do not alter the requisite burden of proof beyond reasonable doubt;

C. Because 10/12 verdicts enjoy public confidence; and

D. Because allowance of 10/12 verdicts works by improving the administration of justice and facilitating the decisional process.

ARGUMENT

The Oregon Law

In 1931, the Crime Commission of Oregon,[1] charged by the legislature with the duty of investigating into the problems of crime in Oregon, recommended *inter alia* that the Constitution of Oregon be amended so as to allow for guilty verdicts, except in capital cases,[2] upon a vote of ten out of twelve jurors.[3]

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[1] The breadth of the philosophical spectrum of the eleven members is demonstrated by two of their number who later assumed federal posts, Wayne L. Morse and Dorothy McCullough Lee who became members, respectively, of the Senate and of the Subversive Activities Control Board.

[2] Capital punishment has since been abolished in Oregon. Oregon Constitution, Art. I, sec. 37 was repealed by vote of the people in 1964.

[3] Report of the Crime Commission of Oregon to the Thirty-Seventh Legislative Assembly of the State of Oregon (1931).

The constitutional amendment to allow verdicts of guilty or not guilty by ten out of twelve jurors in circuit court (the court of general jurisdiction) was adopted by vote of the people in May 1934. Oregon Constitution, Art. I, sec. 11 was thereby amended to read in relevant part:

> "In all criminal prosecutions, the accused shall have the right to public trial by an impartial jury in the county in which the offense shall have been committed; . . . . provided, however, that any accused person, in other than capital cases, and with the consent of the trial judge, may elect to waive trial by jury and consent to be tried by the judge of the court alone, such election to be in writing; provided, however, that in the circuit court ten members of the jury may render a verdict of guilty or not guilty, save and except a verdict of guilty of first degree murder, which shall be found only by a unanimous verdict, and not otherwise; . . . ."

Each of the three petitioners in this consolidated appeal were found guilty by non-unanimous verdicts in the courts of Oregon and the federal constitutional validity of Art. I, sec. 11 of the Oregon Constitution is here in issue. The Oregon Supreme Court upheld the procedure against a Sixth Amendment challenge in the thoughtfully reasoned opinion of *State v. Gann*, 254 Or 549, 463 P2d 570 (1969) which is set out fully *post* at page 33.

The Issue as Framed in *Duncan* and *Williams*

At the turn of the century, the Supreme Court held that the Sixth Amendment right to jury trial was no

part of the Fourteenth. In *Maxwell v. Dow*, 176 US 581 at 605 (1900), the Court stated its holding that

> "it is in entire conformity with the character of the Federal Government that [the people of the states] should have the right to decide for themselves . . . whether there shall be a jury of twelve or a lesser number, and whether the verdict must be unanimous or not. These are matters which have no relation to the character of the Federal Government. *cf. Thompson v. Utah*, 170 U.S. 343 (1898)."

In *Duncan v. Louisiana*, 391 US 145 (1968) the Supreme Court held that the Fourteenth Amendment guarantees a right to trial by jury in state cases which, were they federal, would be tried by jury under the Sixth Amendment. The Court so held because "we believe that a fair trial by jury in criminal cases is fundamental to the American scheme of justice . . . ." The majority opinion traced the definition of due process, as applied to the right to jury trial, and reformulated it as follows:

> "The question thus is whether given this kind of system [as has developed contemporaneously in England and the United States] a particular procedure is fundamental—whether, that is, a procedure is necessary to an Anglo-American regime of ordered liberty." 391 US at 149-150.

In deciding that jury trial was necessary to the Anglo-American concept of ordered liberty, pains were taken not to imply a holding that the federal jury practice in all its particulars was being thrust upon the states. Mr. Justice Fortas in his concurring opinion stated the implicit limitation of the holding:

> ". . . I see no reason whatever, for example, to

assume that our decision today would require us to impose federal requirements such as unanimous verdicts or a jury of 12 upon the States. We may well conclude that these and other features of federal jury practice are by no means fundamental—that they are not essential to due process of law—and that they are not obligatory on the States.

"Neither logic nor history nor the intent of the draftsmen of the Fourteenth Amendment can possibly be said to require that the Sixth Amendment or its jury trial provision be applied to the States together with the total gloss that this Court's decisions have supplied." (There follows an excellent exposition of the value of diversity in the federal system.) 391 US at 213.

The case of *Williams v. Florida*, 399 US 88 (1970) confirmed that expression of the limitations of *Duncan*. The Fourteenth Amendment requires less than complete state-federal symmetry. A six member jury was held to satisfy the Sixth and Fourteenth Amendments. The Court stated the issue thus:

". . . . The relevant inquiry, as we see it, must be the function that the particular feature performs and its relation to the jury trial. Measured by this standard, the 12-man requirement cannot be regarded as an indispensable component of the Sixth Amendment.

"The purpose of the jury trial, as we noted in *Duncan*, is to prevent oppression by the Government. 'Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge.' *Duncan v. Louisiana, supra*, at 156." 399 US at 99-100.

The inquiries in this case were thus framed in *Duncan* and *Williams*. The burden of this brief will be to demonstrate that the requirement of unanimity of verdict is not comprehended by the Sixth Amendment because:

(1) It is not a necessary element of the "Anglo-American regime of ordered liberty;"
(2) It was omitted from the Constitution and specifically deleted from the Sixth Amendment; and
(3) It is not essential to the accomplishment of the purposes of the right to trial by jury.

I. Unanimity is not a necessary element of the Anglo-American jury system

A. Because the unanimity requirement is an historical accident;

Although unsuccessful attempts have been made to explain the policy reasons for the requirement of unanimity in common law jury procedure,[4] the requirement appears to have been the same sort of "historical accident" as *Williams* determined the 12-men requirement to have been. 399 US at 89.

The unanimity rule derived from the Twelfth Century practice of *afforcement*. Early jurors were knights, then landholders, with personal knowledge, or its equivalent of the fact at issue. Twelve were assembled and new jurors were added until the requisite number of oaths in agreement were accumulated. Those who dis-

[4] See Ryan, *Less Than Unanimous Jury Verdicts in Criminal Trials*, 58 J Cr L C & P S 211, 212 (1967).

agreed were regarded as false and were rejected from the group. Thayer, *The Jury and Its Development*, 5 Harv L Rev 249, 261 (1892); Proffatt, Trial by Jury (1876) 113-115; Devlin, Trial by Jury (3 ed 1966) 8.

The requisite number of oaths to establish a fact increased with the gravity of the consequences of that fact. In the time of Henry II, twelve oaths were required to prove disseizin—jurors were free to disagree, but the accumulation of twelve oaths was required; five were required to prove payment of a written instrument; two were required to prove most facts in dispute. Forsyth, Trial by Jury (2 ed, Morgan rev. 1875) 197-198. Therefore, the rule had its origins as a means of proof rather than as a method for judging, much as today we require two witnesses to attest a will or to prove perjury.

The practice of accumulation of oaths became a requirement of unanimity as a result of the shift from witness-jurors to a fixed number of judge-jurors. Lord Devlin states it thus:

> "The rule makes a startling exception to the ordinary processes of English administrative life where decisions, even the most momentous, are almost invariably produced from a majority vote. Why is the verdict of a jury thought to require a degree of assent which for most purposes would be rejected as impracticable? The answer is that nobody ever planned it that way; the rule is simply an antique. Twelve witnesses were required to support the winning party and naturally for that purpose their testimony had to be unanimous; when the twelve witnesses were translated into judges, the unanimity rule, notwith-

standing that its original significance had then departed, remained with them. The rule was clearly settled in 1367, long before the jury was exercising any real judicial function; . . . ." Devlin, *supra*, at 48.

From at least the Sixteenth Century, the English common law generally required unanimity of its lay fact finders,[5] though the practice was otherwise in some of the American colonies. See *Williams v. Florida, supra*, 399 US at 98 fn 5.

Of course, that is not the end of the inquiry. As Mr. Justice Harlan said in his dissent to *Duncan v. Louisiana, supra*, at 172:

"The Due Process Clause of the Fourteenth Amendment . . . does not command adherence to forms that happen to be old . . . ."

B. Because unanimity is no longer required in England, and certain other Commonwealth jurisdictions;

The rule was never free from criticism. See, e.g. Proffatt, *supra* at 115; Forsyth, *supra* 208-209. The latter quotes Blackstone's contemporary, Professor Christian, as writing that: "the unanimity of 12 men, so repugnant to all experience of human conduct, passions and under-

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[5] Petitioners claim (Pet. Br 8, n 10) that a 1367 case established the principle that an 11-1 verdict could not be received. Forsyth, in his treatise on Trial by Jury, *supra*, at 199 cites two Sixteenth Century cases in which 11 man verdicts were received and the refractory juror imprisoned. Bro. Abr. Jurors pt 54, Fitz. Abr. verdict 40. Counsel was unable to translate either abridgement or find anybody who could, and therefore relies on Forsyth's rendition of the Norman English.

standings, could hardly in any age have been introduced into practice by a deliberate act of the legislature."[6]

The first of several institutional attempts to repeal the unanimity requirement was the Report of the Commissioners on Criminal Law (London 1830)[7] which observed that full discussion and consideration of minority views was essential, but that compromise and other factors operated to give more the illusion than the reality of unanimity. The observation is equally true today, see *post* p. 12. It therefore recommended that 8-4 or 9-3 verdicts be accepted after a minimum of twelve hours of deliberation designed to assure thorough deliberation.

That reform was finally accomplished in 1967. Parliament enacted the Criminal Justice Act of 1967, s. 13, which provides for a unanimous verdict until the com-

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[6] The pithiest critic was Jeremy Bentham in The Elements of the Art of Packing as Applied to Special Juries (London 1821), he noted that one need corrupt only a single juror, preferably "one, any one, gained and properly armed, armed with the necessary degree of *patience*," whereas under a majority system one so disposed would have the more difficult burden of corrupting a greater number. *Id* at 44.

Like Professor Christian, Bentham wrote:

> "If the *mode of forming verdicts* had been the work of calm *reflection*, working by the light of *experience*, in a comparatively *mature* and *enlightened age*, some number, certain of affording a *majority* on one side, *viz.* an *odd* number, would, on this as on other occasions, have been provided; and to the decision of that preponderating number would of course have been given the effect of the conjunct decision of the whole." *Id* at 45.

Bentham noted also that the unanimity rule "gives to any *one* of these jurors . . . the power of *all twelve*," particularly to that juror "whose power of *endurance is greatest*." *Id* at 47, 46. (Original emphasis throughout.)

[7] See Devlin, supra, at 51; Forsyth, supra at 208-209.

pletion of a minimum deliberation period of two hours, after which a verdict concurred in by ten jurors, or nine out of ten jurors, may be received:

"(1) Subject to the following provisions of this section, the verdict of a jury in criminal proceedings need not be unanimous if—
(a) in a case where there are not less than eleven jurors, ten of them agree on the verdict; and
(b) in a case where there are ten jurors, nine of them agree on a verdict;
and a verdict authorized by this subsection is hereafter in this section referred to as 'a majority verdict'.

"(2) A court shall not accept a majority verdict of guilty unless the foreman of the jury has stated in open court the number of jurors who respectively agreed to and dissented from the verdict.

"(3) A court shall not accept a majority verdict unless it appears to the court that the jury have had not less than two hours for deliberation or such longer period as the court thinks reasonable having regard to the nature and complexity of the case.[8]"

It should also be noted that 8/15th majority verdicts, without minimum deliberation time, are and always have been allowed in Scottish criminal cases, although civil verdicts must be unanimous. 5 Encyclopedia of the Laws of Scotland, *Crime* 255 § 621; McDonald, Criminal Law

[8] The arguments pro and con, with the author's statement of the con having a bit the better of it, are summarized in Samuels, *Criminal Justice Act*, 31 Modern Law Review 16, 24-27 (London 1968). Harking back to Jeremy Bentham, great stress was laid by the proponents upon the possibility of "nobbling" or jury tampering, a risk, which, while important, seems not sufficient in itself to justify the departure from previous practice.

of Scotland (4 ed, Mitchell rev 1929) 559. South Australia, Western Australia Victoria, Tasmania and Queensland allow 5/6th majority verdicts in non-capital cases despite a federal constitutional provision based upon the Sixth Amendment. See Pannam, *Trial by Jury and Section 80 of the Australian Constitution*, 6 Sydney L Rev 1, 2, 18 (1968).[9]

C. Because the Anglo-American system has encouraged and accepted the illusion, not the reality of unanimous verdicts. The majority verdict is more effective, less fictitious than other accepted devices;

The law can achieve the appearance, but not always the substance of unanimity. Unanimity is commonly an artificial condition among contentious, varying individual human beings. People are not unanimous unless they are forced to be—particularly so in this democratic era of broadly representative juries who decide cases after an adversary hearing designed to wrench their emotions and intellects one way, then the other, and then back again. See Forsyth, *supra*, at 204-206.

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[9] "To be sure, other jury systems operate quite satisfactorily without requiring a public verdict that is unanimous. The Scottish 15 man jury, for instance, as is well known, decides with a simple majority of votes. The 12 men juries on the European continent require usually a three-fourths majority for a finding of guilty; anything less acquits the defendant, there can be therefore no jury deadlock. An odd variant is probably the Brazilian jury which is not allowed to deliberate; at the end of the trial each juror is simply polled in writing, the votes are counted and the majority decides." Kalven & Zeisel, *The American Jury: Notes For an English Controversy*, 48 Chi Bar Rec 195, 201 fn (1967). See also von Moschzisker, Trial by Jury (2d ed 1930).

Given the requirement of unanimity despite the nature of the human animal, the law quickly developed the necessary devices to enforce unanimity even upon non-unanimous groups of people. Unanimity was as often as not the expression of coercion rather than of conviction. Proffatt, *supra*, at 114. From the beginnings into more modern times, physical force was employed.

In the Thirteenth Century, a dissentient juror was imprisoned or fined, Thayer, *supra* at 296-297, but that practice was soon discontinued as too harsh.[10] In the time of Edward III, there developed the short-lived practice of carrying an undecided jury in a cart to the next assize until they were agreed on a verdict. III Blackstone, Commentaries 376, Forsyth, *supra*, at 200, Devlin, *supra* at 50-51.

When imprisonment and kidnapping ceased, the law settled upon the method of compelling unanimous decision which prevailed until relatively recent times, denial of food and drink. In Elizabethan times it was customary for the prevailing litigant to celebrate his victory by entertaining the fatigued jury with supper, a practice which no doubt hastened successful deliberation. The device of abstinence was apparently still common in 1875, the time at which Forsyth wrote his treatise, Forsyth, *supra*, 200-201. In England, as late as 1858, a new trial was ordered because food and drink had been passed up to the jury on a string thus increasing

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[10] Although, see Thayer, *supra*, at 380-381 for similar practices extending into the Eighteenth Century.

the ability to endure without a unanimous decision. *Cooksey v. Haynes*, (1858) 27 Law J Rep (NS) Exch 371. The practice continued in England until passage of the Juries Act (1870) s. 23 which authorized the judge to allow jurors to purchase food and drink if they were unable to continue deliberations without it.

We no longer starve our juries into unanimous decision, but we employ subtle means to overcome the natural resistance to unanimity. Seventeen states allow the trial court to summarize the evidence for the jury, and eleven states and the federal system authorize the trial court to summarize and comment upon (i.e. evaluate for the jury) the evidence.[11] In a study of 101 cases in which the judge employed such controls, the jury failed to agree with the judge only once, and then by an 11-1 vote.[12] Neither practice is permitted in Oregon. Further, it is common practice in both England and the United States to give a so-called "dynamite" charge to break up a jury deadlock.[13] Despite careful phraseology, the clear implication of judicial desire and directive is apparent to the dissenting juror who hears the "Allen" charge.

Even in jurisdictions which are free from judicial comment or summary and from the "Allen" charge, every trial lawyer has often heard the standard admonition of

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[11] Kalven & Zeisel, The American Jury (1966) 420.

[12] *Id.* at 427.

[13] *Allen v. United States*, 164 US 492 (1396). The English version is set out in Devlin, *supra*, 52-53. The Oregon Supreme Court has not considered the practice.

the trial judge to a deadlocked jury to return to the jury room and continue their deliberations.

The deliberative process itself encourages the merger of differing opinions into the illusion of unanimity. Compromise is common where dollar amounts are involved, and it is clearly human nature to try to find middle ground. The minority will frequently come over after long deliberation because nobody wishes to be alone, because of the social undesirability of being thought of as obstinate, because it is ungracious to inconvenience one's companions, or simply to get home to one's family. See Barnet, *The Jury's Agreement—Ideal and Real*, 20 Or L Rev 189, 195 (1941); Forsyth, *supra* at 205-206; Osborn, The Mind of the Juror 166 (1937).

The structure of criminal law and procedure, with its lesser included offenses and, in some states other than Oregon, jury participation in sentencing, is particularly conducive to compromise verdicts wrapped in the appearance of unanimity. One commentator observed accurately:

> "In theory there are no compromise verdicts in criminal cases. Yet there are situations where the jurors may reach agreement just to end deliberation—not because all of them are convinced beyond a reasonable doubt that the defendant is guilty or innocent. Other opportunities for a compromise occur when the jury is permitted to find the defendant guilty of a crime within a crime. In both of these situations there is a possibility that the jurors will not reach true unanimity. Of course this possibility is always present but the chance is greater when an alternative conclusion is available to the jury." (Footnotes omit-

ted.) Comment, *Waiver of Jury Unanimity—Some Doubts About Reasonable Doubt*, 21 U Chi L Rev 438, 444 (1954) .

Were the law to steadfastly insist upon unanimity in all cases, it would be impossible to resolve issues expeditiously except in unusual cases. That is why the law has necessarily developed the various devices, *e.g.* lengthy sequestered deliberation, "dynamite" charges, structural encouragement of compromise, all designed to overcome the unlikelihood of spontaneous and voluntary unanimity.

The allowance of a verdict by a substantial majority is a direct, realistic and candid device to accomplish the same result as the forceful and fictitious practices just described. If realism is to be encouraged and fiction discouraged, then the law would do well to endorse the Oregon system which allows each juror to register his conviction, and to discourage the practice of forcing juries into artificial agreement by disguised pressures.

D. And because distinguished American legal groups have endorsed its qualification and four states have modified the unanimity requirement.

If unanimity is not a part, much less an essential part, of the Anglo side of the Anglo-American regime of ordered liberty, it also has less than unanimous acceptance on the American side.

The American Law Institute, Code of Criminal Procedure 137 § 355 (1931) provided the model for the Oregon constitutional provision:

> "In capital cases no verdict may be rendered unless all the jurors concur in it. In other cases of

felony a verdict concurred in by five-sixths of the jurors, and in cases of misdemeanor a verdict concurred in by two-thirds of the jurors may be rendered.①

"① These proportions are based on a jury of twelve. Where a jury may consist of less than twelve some other proportions may be thought advisable."

Most recently, the English Criminal Justice Act (1967) s. 13 was endorsed as a proper pattern for American practice in the report of the American Bar Association Project on Minimum Standards for Criminal Justice, Standards Relating to Trial by Jury, 25-28, § 1.1(d) (Approved Draft 1968). The reporters noted that the reduction of the number of mistrials caused by hung juries in an era when criminal justice is oft times denied by the delay of congested dockets, would be a significant improvement. The value of full deliberation and consideration of minority viewpoints within the jury room was appreciated, the report concluded that the two hour minimum deliberation time was sufficient to assure those purposes of the jury system. In sum, it concluded that the English model was a workable model for the conviction of the guilty and the protection of the innocent.

In practice, several American colonies had informal trial practices which included majority verdicts, *Williams v. Florida*, *supra*, at 98 fn. 45; Heller, The Sixth Amendment (1951) 16-18. Petitioners' Brief 19, recognizes that four states today use less than unanimous verdicts. Montana and Oklahoma allow three-quarters majority verdicts in misdemeanor cases, Louisiana allows

nine-twelfths verdicts in non-capital felony cases and Oregon allows ten-twelfths verdicts in non-capital felony and appealed misdemeanor cases. Also, Idaho allows five-sixths verdicts in misdemeanor cases, Idaho Constitution, Art. I, sec. 7. The unanimity requirement was not and is not unanimously accepted in the United States.

Conclusion regarding the Anglo-American regime of ordered liberty and the unanimity requirement

The unanimous verdict is clearly not a requisite component of "the Anglo-American regime of ordered liberty" because it is an historical accident, because it is not required in England or certain parts of the Commonwealth, and because, on the American side, five states do not require it and the two most prestigious American legal institutions have called for the allowance of majority verdicts in criminal cases.

II. Unanimity is not required by the Sixth Amendment because it was omitted from the Constitution and specifically deleted from the Sixth Amendment.

The American colonies did not automatically adopt unanimous jury verdicts as the means for resolution of criminal charges. Early in the colonial period, Connecticut eliminated the unanimity requirement and allowed simple majority verdicts with the judge empowered to break a tie. The requirement of unanimity was also eliminated in the Carolinas. In Pennsylvania, criminal trials were informal affairs, more like arbitra-

tion than trials, with six or seven man juries deciding by majority vote. The practice was otherwise in Maryland, Virginia and, later, North Carolina. Heller, The Sixth Amendment (1951) 16, 18, 22-23.

During the constitutional convention, an attempt was made to amend Article III section 2 by adding the words:

> "and a trial by jury shall be preserved as usual in criminal cases."

Opponents argued that the practice was so diverse among the states that "usual" had no meaning and the amendment failed. 5 Elliott, Debates on the Adoption of the Federal Constitution (1907) 550.

There was sufficient criticism of the new Constitution for failure to set forth the details of the right to trial by jury, that Hamilton deemed it desirable to explain the omission. In The Federalist Papers, No. 83, he wrote that it was impossible for the states to come to agreement and undesirable to set forth detail in the Constitution because the practice among the states was so diverse as to both subject matter and procedure. To illustrate the procedural differences, he described the practice of four eastern states which is of particular interest on the subject of unanimity:

> "There is an appeal *of course* from one jury to another til there have been two verdicts out of three on one side." (Original italics.)

Upon adoption of the Constitution, there were 103 requests for amendments originating from five states. Among them were expressions from New York, Virginia and, as petitioners point out, North Carolina, that unan-

imous jury trials should be guaranteed. Heller, *supra* at 29. North Carolina, incidentally, did not actually include the unanimity requirement in its requested amendments, but only in the preceding Declaration of Rights. 4 Elliott's Debates, *supra*, at 242-247. James Madison assumed the task of reformulating and submitting the proposed amendments to the Congress.[9]

Madison's proposal for an amendment, which ultimately became the Sixth Amendment, included specific reference to the unanimity requirement. It read:

> "The trial of all crimes . . . shall be by an impartial jury of freeholders of the vicinage, with the requisite of unanimity for conviction, of the right of challenge, and other accustomed requisites . . . ."

The amendment passed the House of Representatives in substantially that form, but the Senate deleted every clause except that relating to grand jury indictment and presentment. Two days thereafter, a House motion to restore the unanimity clause, that is the original language except for the freeholder clause, failed of passage by an even vote. The Sixth Amendment in its present form was then approved by the House. Madison had tried in committee to restore at least the "accustomed requisites"

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[9] The majority opinion in *Williams v. Florida*, *supra*, at 94-97, relying heavily upon Heller, The Sixth Amendment (1951), sets out the legislative history of the Sixth Amendment fully. Counsel's research has only confirmed Mr. Justice White's account and added nothing consequential. Therefore, this brief will only summarize the pertinent parts of that account to demonstrate the deletion of the unanimity requirement from the Sixth Amendment, without repetition of the citations.

clause, but failed because of the diversity of procedure among the states.[18]

Thus the original draft of the Sixth Amendment specifically required unanimity, the requirement was specifically deleted by Congress and the restoration effort failed. The Sixth Amendment went successfully to the States for ratification with the unanimity clause stricken. For the Supreme Court to reinsert the requirement which the Congress specifically deleted, as petitioners urge, would be to judicially override the express votes of Congress and of the States in the drafting, submission and ratification of the Amendment.

III. Unanimity is not required by the Sixth Amendment because it is not essential to the purpose of trial by jury—

The purpose of criminal trials is to fairly determine the guilt or innocence of those persons whom the government has accused of crime.

The language of *Williams v. Florida, supra*, at 99-100, is here again important:

> "The relevant inquiry, as we see it, must be the function that the particular feature performs and its relation to the purposes of the jury trial. . . . .
>
> "The purpose of the jury trial, as we noted in *Duncan*, is to prevent oppression by the Government.

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[18] Pertinent to this case, Madison's letter to Pendleton, describing his difficulties with the eleven representatives of the states, continued:

> "The difficulty of uniting minds of men accustomed to think and act differently can only be conceived by those who have witnessed it."

'Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the complaint, biased or eccentric judge.' *Duncan v. Louisiana, supra*, at 156. Given this purpose, the essential feature of a jury obviously lies in the interposition between the accused and his accuser of the commonsense judgment of a group of laymen, and in the community participation and shared responsibility that results from that group's determination of guilt or innocence. . . . ."

A. Because a 10/12 verdict requirement is an adequately substantial shield against judicial or prosecutorial oppression;

The insistence of the colonists upon trial by jury without specification of the mode of jury trial illustrates their concern that they be subject to the mercies of their lay peers and not those of the judges. The contemporary distrust of judges is demonstrated by this denunciation of English judges:

"For two hundred years the judges in England sat on the bench condemning to the penalty of death, every man, woman and child who stole property to the value of five shillings and during that time not one judge remonstrated against the law." By John Bright, quoted by Henry James and, in turn, by Heller, *supra*, at 13.

The question, then, is whether a requirement that ten out of twelve jurors must concur to determine guilt or innocence, is a sufficient substantial interposited safeguard to prevent oppression. It clearly is.

First, it is important to note that unanimity *per se*

is not essential to such protection. It is but one means to assure the adequacy of protection against governmental arbitrariness. The importance of unanimity increases as the number of jurors diminishes.[16] The interposition of a jury of 100, 99 of whom must concur to convict, or of 1000 of whom 999 are required, would be a far more substantial safeguard than the requirement of six unanimous jurors which *Williams* allows, even though unanimity is not required.[17] Also, unanimity is clearly not essential to, or a guarantor of the quality of decision, *cf. Oregon* v. *Mitchell*, — US — (1970); *cf. Jacobellis v. Ohio*, 378 US 184 (1964). Therefore, the question is not whether unanimity is required, but rather whether the jury procedure in question, unanimous or not, is sufficiently substantial to perform its safeguard function and prevent governmental oppression.

Whether ten out of twelve is sufficiently substantial a shield is necessarily a subjective judgment. It is difficult to argue the merits beyond affirming or denying the proposition. It is significant, though, that England is satisfied that a 10/12 majority verdict is an adequate safeguard, Criminal Justice Act (1967) s. 13, and that the American Law Institute in 1931 and the American Bar

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[16] See, e.g., Tamm, *The Five-Man Civil Jury: A Proposed Constitutional Amendment*, 51 Geo L J, 120, 139-140 (1962).

[17] The argument reductio ad absurdum can go the other way: Should six jurors out of eleven be allowed to convict or acquit? Obviously not, because the simple majority is not sufficiently substantial an interposition to safeguard against oppression. We shall not attempt to draw lines. Oregon too can get off the "slippery slope" before it reaches bottom. *Cf. Williams*, n 28.

Association Project on Minimum Standards for Criminal Justice in 1968, both distinguished assemblages of legal scholars and practitioners,[18] endorse that proportion as being proper.

This Court held in *Williams* that the judgment of six men interposed between the accused and his government is a sufficiently substantial protection against oppression. The persuasion of ten men out of twelve, following a full and fair adversary hearing on the facts and appropriate instruction of law, that the guilt of the defendant has been proved beyond any reasonable doubt, provides a high hurdle for the prosecution to overcome. It belittles jurors to suspect that only two of twelve citizens would recognize governmental overstepping or that ten of twelve would accede to oppression. The requirement that ten members of the jury concur is at least an equally substantial protection as the six man jury authorized in *Williams*.

It is not necessary, as petitioners urge, to carve unanimity into the immutable granite of the Constitution in order to assure consideration of minority opinion in the jury room. The simple procedural device of a minimum period of deliberation—statutorily required in England and recommended by the ABA Project—will accomplish

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[18] To illustrate, on the ABA Project, Minimum Standards Relating to Trial By Jury was reported out of the Advisory Committee on the Criminal Trial chaired by the Hon. Walter V. Schaefer and reported by Professor Wayne R. LaFave. The report was approved by the Special Committee on Minimum Standards for the Administration of Criminal Justice chaired by the Hon. J. Edward Lumbard.

that purpose without giving to the scant minority the absolute power to prohibit decision. The minimum deliberation provision of the English Criminal Justice Act of 1967 has much merit—it seems inappropriate to resort to constitutional prohibition to accomplish what a simple remedial statute could more readily do.

B. Because 10/12 verdicts do not alter the requisite burden of proof beyond reasonable doubt;

Petitioners in brief echo the doubts raised by the Court in *Williams*: Does the reduction of the requisite proportion of jurors diminish the required standard of proof beyond reasonable doubt?[19]

The idea that proof beyond reasonable doubt requires that all twelve jurors concur,[20] is erroneous. The proposition confuses burden of proof and burden of persuasion.

"We intimate no view whether or not the requirement of unanimity is an indispensible element of the Sixth Amendment jury trial. While much of the above historical discussion [on the adoption of the Sixth Amendment] applies as well to the unanimity as to the 12-man requirement, the former, unlike the latter, may well serve an important role in the jury function, for example, as a device for insuring that the Government bear the heavier burden of proof. [citations]" *Williams v. Florida, supra*, 399 at 100 fn 46.

[19] Petitioner cites *Hibdon v. United States*, 204 F2d 834, 838 (6 Cir 1953) for the proposition. That case was decided upon two additional grounds: that the stipulation to a majority verdict was contrary to Rule 31 (a) FRCrP, the federal statutory requirement for unanimous verdicts; and that by requesting the defendant to stipulate to a majority verdict in the presence of the jury which had reported its deadlock, the judge compelled the defendant to involuntarily waive his right to unanimity. Particularly under the hard facts of the case, the latter two grounds stand up better than the "inextricably interwoven" paragraph cited at Petitioner's Brief 13. See *Fournier v. Gongalez*, 269 F2d 26 (1 Cir 1969).

If the dissenting vote of a juror meant that the state had failed in its burden of proof, then a hung jury would be the equivalent of an acquittal and a retrial would be double jeopardy. Of course, it is not. *Dreyer v. Illinois*, 187 US 71 (1902). In that situation, the state has simply failed to persuade, an entirely different burden than the burden of proof. Comment, *Waiver of Jury Unanimity —Some Doubts About Reasonable Doubt,* 21 U Chi L Rev 438, 441-443 (1954).

Whatever the vote of the jurors, the burden of proof beyond reasonable doubt remains constant. Whether that burden has been carried is a legal question for the court to determine at the end of the state's case on the defense motion for judgment of acquittal. If there is sufficient evidence from which proof beyond reasonable doubt may be inferred, the case goes to the jury. If not, the case is dismissed.

The burden of persuasion in a criminal case is that burden imposed upon the prosecution to convince the requisite number of jurors of the truth of the facts it seeks to prove. A decision by ten of twelve jurors in no way diminishes the state's burden of proof of guilt because each of those ten must be persuaded of guilt beyond a reasonable doubt.

Whether it is constitutionally sufficient to empower ten of twelve jurors to convict if they are persuaded beyond reasonable doubt, must be determined again in light of the purposes of the Sixth Amendment right to trial by jury: does that system interpose the common-

sense judgment of one's peers between him and his government to such a degree as will assure against an oppressive government. The persuasion of ten of twelve citizen-jurors beyond reasonable doubt is sufficient for the accomplishment of that constitutional purpose.

The Oregon Supreme Court answered that proposition realistically:

> ". . . . In our opinion a failure of one or two jurors to agree with the verdict of their fellow jurors is more likely to be caused by a failure of the dissenters to correctly understand the evidence or the court's instructions or by some extraneous cause having no relation to the quantum of proof. Proof beyond a reasonable doubt is not like a physical or chemical property the presence of which can be objectively ascertained. Unless the absence of proof is so conspicuous that a judge can hold 'as a matter of law' that proof beyond reasonable doubt has not been established, there is no test to determine whether such a degree of proof has been adduced. It does not appear that the nonconcurrence of one or two jurors signals such a defect." *State v. Gann*, 254 Or 549 at 563, 463 P2d 570 (1969). (Set out fully *post*, p. 33.)

We agree with petitioners that it is essential in our democracy that the jury be broadly representative of the community as a whole. *Williams* holds that a six-man jury is sufficient to assure such representation where there is no deliberate exclusion. While none should be excluded and each should be heard, it is clearly not essential to Anglo-American jurisprudence that each should have the power of veto.

C. Because 10/12 verdicts enjoy public confidence;

Finally, petitioners assert without demonstrating, that unanimity is essential if there is to be public confidence in the criminal process[20] (Petitioners' Brief 17), but the unanimity requirement is the chance product of the common law whereas the Oregon procedure was adopted by public referendum. If the public lacks confidence in the criminal justice system these days, it is surely not for the reason that 10/12 verdicts are allowed.

D. Because allowance of 10/12 verdicts works by improving the administration of justice and facilitating the decisional process.

While the primary and historic purpose of the jury system is to provide a shield, its primary function is to decide cases and to do so fairly, accurately and expeditiously. Oregon's modification of the unanimity pro-

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[20] Petitioners support their assertion with a beautifully expressed paragraph from von Moschzisker, supra, 299-300, about "general satisfaction and public contentment" and how a convicted felon will "accept the verdict with much better grace than one reached by a split jury." Von Moschzisker obviously speaks the feelings of an earlier age. His authority seems rather diminished by his next argument justifying the unanimity requirement: that it is necessary for the preservation of our system of private property. He adopts as "well said" the following quotation from Joseph L. Choate:

> "Imagine a jury aroused to even just indignation by the oppression, or even misconduct, of a rich individual or gigantic corporation against an unfortunate plaintiff, and not restrained by the cooler sense and judgment of the three or four most conservative or intelligent of their number, and you can easily foresee what havoc they would make with the rights of property." *Id* at 300-301.

There is too much rhetoric and too little analysis on this issue.

cess removes several impediments to the decisional process without doing injury to its safeguard role.

The most common impediment to the decisional process is the possibility of mistrial because of one or two jurors prevent decision.[8] While prisoners languish and accused defendants on bail operate under a cloud awaiting a trial date which is delayed by congested dockets, while the public is prey to untried professional criminals, while the correctional process is rendered ineffective in part because of its remoteness in time from the commission of the crime, and while court administrators strive merely to retard the accelleration of delay in the criminal courts, mistrials and retrials are a luxury society can ill afford. It is reported that states with unanimity requirements suffer a 5.6% mistrial rate whereas in states which allow non-unanimous verdicts the rate is reduced to 3.1%. That constitutes a 45% reduction in the number of mistrials due to deadlock. Kalven & Zeisel, The American Jury (1966) 461. A reduction of the waste of judicial time and resources by 45% is a significant achievement in the administration of criminal justce. Oregon jury procedure is one substantial reason that Oregon's dockets, and particularly those of Multnomah County (Portland), are among the most current in the nation.

Another impediment which, since before the time

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[8] Actually, it appears that the chances are greater that a potential acquitting jury will hang than that a convicting one will do so. See Kalven & Zeisel, The American Jury (1966), Table 127 at 462, based upon a sampling of 156 cases.

of Jeremy Bentham, occurs occasionally but is discovered rarely, is jury tampering. It is particularly a threat in the prosecution of organized crime. *Cf. Hoffa v. United States*, 385 US 293 (1966); *Osborn v. United States*, 385 US 323 (1966). The substantial majority verdict system renders jury tampering extremely difficult, although Hoffa attempted to fix more than two, and unlikely of success.

The Oregon system succeeds. Nowhere does Petitioners' Brief complain of unfairness or oppression or insufficiency of proof either generally or in the cases at bar. Critics of the system have not pointed to failures of justice under it. *Cf.* Kirkpatrick, *Should Jury Verdicts Be Unanimous in Criminal Cases?*, 47 Or L Rev 417 (1968). Kalven and Zeisel, in recommending against English adoption of the substantial majority verdict system, acknowledged:

> ". . . . And then there is, of course, the State of Oregon which allows the very 10:2 and 11:1 verdicts which the Criminal Justice Bill proposes for England, and justice in Oregon has not broken down; but then also nobody has ever claimed that Oregon justice is superior to justice elsewhere." Kalven & Zeisel, *The American Jury, Notes for an English Controversy*, 48 Chi Bar Rec 195, 201 fn (1966).

Due process, of course, does not require that Oregon justice be superior to justice elsewhere. It requires only that Oregon justice meet Anglo-American expectations of fairness, expedition, reliability and respect for individual freedom. Oregon process meets those expectations in a manner which, judging from the action of

Parliament and the recommendations of the American Bar Association Project and the American Law Institute, may provide a laboratory model for the future development of criminal procedure. Absent some showing of injustice or unfairness, and the petitioners have made none, the Oregon procedure should be upheld as constitutionally permissible.

CONCLUSION

The Oregon judgments should be affirmed.

Respectfully submitted,

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APPENDIX

STATE OF OREGON, *Respondent, v.*
TIMOTHY EARL GANN,
Appellant.
254 Or 549, 463 P.2d 570 (1969)

DENECKE, J.

The defendant was convicted of holding a person as a hostage within the Oregon State Penitentiary. Subsequently, an information of previous convictions was filed and the defendant was sentenced to life imprisonment. He appeals.

I

1. The defendant contends that he was convicted in violation of the sixth and fourteenth amendments to the Federal Constitution because he was convicted by a verdict of ten of twelve jurors.[1]

In 1934 the people of Oregon amended the Oregon Constitution as follows: "* * * [P]rovided, however, that in the circuit court ten members of the jury may render a verdict of guilty or not guilty, save and except a verdict of guilty of first degree murder, which shall be found only by a unanimous verdict, and not otherwise; * * *." Oregon Constitution, Art I, § 11.

Prior to the amendment of the Oregon Constitution the United States Supreme Court held that the Sixth Amendment required that in federal trials the jury consist of twelve men and stated that the jury verdict in such cases must be unanimous. *Thompson v. State*

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[1] "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed * * *." U. S. Const., Amend. VI.

"* * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U. S. Const., Amend. XIV, § 1.

of Utah, 170 US 343, 351, 353, 18 S Ct 620, 42 L Ed 1061 (1898). A similar view was also expressed in *Maxwell v. Dow,* 176 US 581, 586, 20 S Ct 448, 494, 44 L Ed 597 (1900). However, in the latter case it was held that the Constitution of the United States, including the Due Process Clause of the Fourteenth Amendment, did not require the states to try criminal cases with a jury and did not prohibit a state from providing that a jury in noncapital criminal trials would consist of eight jurors instead of twelve. Hence, the Oregon constitutional provision was not thought to present any problem either at the time of its adoption or for many years thereafter.

The decisions of *Duncan v. Louisiana,* 391 US 145, 88 S Ct 1444, 20 L Ed2d 491, rehr den 392 US 947, 88 S Ct 2270, 20 L Ed2d 1412 (1968), and *Bloom v. Illinois,* 391 US 194, 213, 88 S Ct 1477, 20 L Ed2d 522 (1968), have recently caused uncertainty as to the validity of Art I, § 11, of the Oregon Constitution. Those cases overruled *Maxwell v. Dow,* supra (176 US 581), and its successors and decided that the right to a trial by jury in a criminal case, as guaranteed in federal trials by the sixth amendment to the Federal Constitution, is guaranteed in state trials by the Due Process Clause of the Fourteenth Amendment.

In the case at bar, the defendant and the dissent argue that defendants in state criminal trials can be convicted only by a unanimous twelve-man jury verdict because the Sixth Amendment has been held to require a unanimous verdict by a jury of twelve men in federal criminal trials, and the Sixth Amendment right to a jury trial is now applicable to the states by way of the Fourteenth Amendment.

It should be noted, however, that it has not been held that all the aspects of the right to a jury trial in federal criminal cases apply identically to state

criminal trials. Mr. Justice White, writing for the majority in *Duncan v. Louisiana,* supra (391 US 145), observed at 158, note 30, that Louisiana asserted that if trial by jury is made mandatory on the states, all the incidents of trial by jury which have previously been held to be guaranteed by the Sixth Amendment in federal trials will also be mandatory. Mr. Justice White did not answer this contention, but rather stated that the *Duncan* decision would not require widespread changes in the laws of the states. He gave as a reason for this statement: "First, our decisions interpreting the Sixth Amendment are always subject to reconsideration * * *." 391 US at 158. Also, Mr. Justice Fortas specially concurring in the majority decision stated:

> "But although I agree with the decision of the Court, I cannot agree with the implication, see *ante,* at 158-159, n. 30, that the tail must go with the hide: that when we hold, influenced by the Sixth Amendment, that 'due process' requires that the States accord the right of jury trial for all but petty offenses, we automatically import all of the ancillary rules which have been or may hereafter be developed incidental to the right to jury trial in the federal courts. I see no reason whatever, for example, to assume that our decision today should require us to impose federal requirements such as unanimous verdicts or a jury of 12 upon the States. We may well conclude that these and other features of federal jury practice are by no means fundamental—that they are not essential to due process of law—and that they are not obligatory on the States." See *Duncan v. Louisiana,* supra (391 US at 162). *Bloom v. Illinois,* supra (391 US at 213).

In our opinion, the case of *De Stefano v. Woods* (*Carcerano v. Gladden*), 392 US 631, 88 S Ct 2093, 20 L Ed2d 1308 (1968), decided after *Duncan v. Louisiana,* supra (391 US 145), and concerning a ten-

to-two Oregon verdict does not offer any indication of how the Court will decide the question of unanimity. The Court held that *Duncan v. Louisiana,* supra (391 US 145), did not apply because the trials were held before that decision. During the current term the Court has again used the same approach. In *De Backer v. Brainard,* 396 US 28, 90 S Ct 163, 24 L Ed2d 148, decided November 12, 1969, the appellant asked the Court to rule that a jury trial was constitutionally required in state juvenile proceedings. The Court instead held that *Duncan v. Louisiana,* supra (391 US 145), would not be applied to juvenile proceedings held before the decision in *Duncan v. Louisiana,* citing *De Stefano v. Woods.* We cannot find in either decision any indication of how the Court would decide the question which the Court avoided answering.

The contention that the Fourteenth Amendment requires a unanimous verdict of twelve jurors is unacceptable for two principal reasons: (1) its cornerstone, the decision that the Sixth Amendment requires a twelve-man unanimous verdict, was reached by a sterile historical approach to the Bill of Rights which is now—and in our opinion very correctly—usually ignored by the United States Supreme Court; and (2) the "right" in issue, a unanimous verdict rather than a verdict by ten of the twelve jurors, is not of sufficient consequence to be fitted with constitutional rigidity.

In *Thompson v. Utah,* supra (170 US 343), the defendant was convicted of a felony by a twelve-man jury in the Utah territorial court. The defendant obtained a new trial. Utah became a state and the second trial was in a Utah state court. As provided by Utah law, an eight-man jury tried and convicted the defendant. A majority of the Court held that because the crime had been committed in the territory of Utah,

federal law applied and the Sixth Amendment required a trial by a twelve-man jury and by dictum stated that unanimity was required of the twelve jurors.

Mr. Justice Harlan, writing for the majority, cited the Magna Charta, Hale, The History of the Pleas of the Crown, Bacon's Abridgment, all to the effect that the common law required a twelve-man unanimous jury and, therefore, the Sixth Amendment so required.

Mr. Justice Harlan was relying upon the same principle of constitutional construction that he stated in his dissent in *Hurtado v. People of California,* 110 US 516, 542, 4 S Ct 111, 28 L Ed 232 (1884). He there quoted from *Murray v. Land & I Co.,* 59 US 272, 276-277 (18 How 1855):

> "'* * * To what principles are we to resort to ascertain whether this process enacted by Congress is due process? To this the answer must be two-fold. We must examine the Constitution itself to see whether this process be in conflict with any of its provisions. If not found to be so, we must look *to those settled usages and modes of proceeding existing in the common and statute law of England before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country.*'" 110 US at 542.

For amplification of Mr. Justice Harlan's views on due process see Johns Hopkins University Studies in Historical and Political Science, 59-82 (1915).

Mr. Justice White in *Duncan v. Louisiana,* supra (391 US at 151, n 16), pointed out that Mr. Justice Harlan was historically inaccurate in stating that the Magna Charta was the origin of the guarantee of a right of trial by jury. Historians now are in general

agreement that the right of trial by jury was not one of the rights wrung from King John in Magna Charta. Clark, *Magna Carta and Trial by Jury,* 58 Am L Rev 24 (1924).

Nevertheless, Mr. Justice Harlan was probably correct that a twelve-man unanimous verdict was the practice in England as well as the colonies in the latter 18th Century. Historians now, however, generally believe that both the requirements of twelve jurors and of unanimity evolved by accident.

Sir Patrick Devlin writes:

> "This leads naturally to a consideration of the unanimity rule. The rule makes a startling exception to the ordinary processes of English administrative life where decisions, even the most momentous, are most invariably produced from a majority vote. Why is the verdict of a jury thought to require a degree of assent which for most purposes would be rejected as impracticable? The answer is that no one ever planned that it should be that way; the rule is simply an antique. Twelve witnesses were required to support the winning party and naturally for that purpose their testimony had to be unanimous; when the twelve witnesses were translated into judges, the unanimity rule, notwithstanding that its original significance had then departed, remained with them. * * *" Devlin, Trial by Jury 48 (1956).

Accord, Proffatt, Jury Trial, 114-115 (1877), and Lesser, History of the Jury System, 188, note 30 (1894), but for a somewhat different version, see 197, note 42. Proffatt has still another theory of origin, which also has no relationship to the modern rule of unanimity.

An accident of English history is not a firm foundation for a cornerstone of American constitutional law; nevertheless, a majority of the United States Supreme Court continued to search English legal his-

tory to determine the scope of the American constitutional guarantee of trial by jury. The ultimate may have been reached in *Dimick v. Schiedt*, 293 US 474, 55 S Ct 296, 79 L Ed 603, 95 ALR 1150 (1935). The majority held that a federal district court violated the Seventh Amendment guaranteeing a jury trial in civil cases because the trial court set aside a verdict in an automobile damage case on the ground that the damages awarded were insufficient. Mr. Justice Stone, joined by Mr. Chief Justice Hughes and Messrs. Associate Justices Brandeis and Cardozo, dissented and by his statement of the question revealed the sterility of the majority's reasoning:

"* * * The question is a narrow one: whether there is anything in the Seventh Amendment or in the rules of the common law, as it had developed before the adoption of the Amendment, which would require a federal appellate court to set aside the denial of the motion merely because the particular reasons which moved the trial judge to deny it are not shown to have similarly moved any English judge before 1791.

"The Seventh Amendment commands that 'in suits at common law,' the right to trial by jury shall be preserved, and that 'no fact tried by a jury shall be otherwise re-examined by any court of the United States, than according to the rules of the common law.' Such a provision of a great instrument of government, intended to endure for unnumbered generations, is concerned with substance and not with form. There is nothing in its history or language to suggest that the Amendment had any purpose but to preserve the essentials of the jury trial as it was known to the common law before the adoption of the Constitution. For that reason the Court has often refused to construe it as intended to perpetuate in changeless form the *minutiae* of trial practice as it existed in the English courts in 1791. From the beginning, its language has been regarded as but subservient to the single purpose of the Amendment, to preserve the

essentials of the jury trial in actions at law, serving to distinguish them from suits in equity and admiralty, see *Parsons v. Bedford,* 3 Pet. 433, 446, and to safeguard the jury's function from any encroachment which the common law did not permit." 293 US at 490-491.

2. In an earlier decision, a majority of the Court, Mr. Justice Harlan dissenting, expressed the same repugnance of the sterile historical method of construction:

"* * * But to hold that such a characteristic [it must be part of the English common law and suited to the American colonies] is essential to due process of law, would be to deny every quality of the law but its age, and to render it incapable of progress or improvement. It would be to stamp upon our jurisprudence the unchangeableness attributed to the laws of the Medes and Persians." *Hurtado v. People of California,* supra (110 US at 528-529).[2]

The United States Supreme Court has on occasion continued to bolster the grounds for their decisions

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[2] Our recent decision in Cornelison v. Seabold, 254 Or 401, 460 P2d 1009 (1969), construing the Oregon constitutional protection of civil jury trials, might be construed as following this same sterile approach. We believe there is a distinction. The Oregon Constitution was not intended to guarantee jury trials in all civil proceedings; therefore, it is appropriate to inquire into historical practice to find a basis for distinguishing between civil cases requiring a jury and others not requiring one. In addition, "* * * the constitutional right of trial by jury is not to be narrowly construed, and is not limited strictly to those cases in which it had existed before the adoption of the Constitution, but is to be extended to cases of like nature as they may hereafter arise." State v. 1920 Studebaker Touring Car, 120 Or 254, 263, 251 P 701, 50 ALR 81 (1927). Hence, the attention to history in *Cornelison,* supra, was in accordance with the general task of the Oregon Supreme Court to determine which civil proceedings among those not set forth in the Constitution require jury trials. The court has an entirely different function in determining the scope of the trial by jury in criminal proceedings guaranteed by the United States Constitution.

by citing English legal history. *Fay v. Noia,* 372 US 391, 83 S Ct 822, 9 L Ed2d 837 (1963). They have not, however, in recent years, decided constitutional rights on the basis of English and colonial practices in 1791. When legal history may not support the Court's view of what the constitution should mean today it has made no reference to history. The change in the application of the right against self-incrimination as contained in the Fifth and Fourteenth Amendments is an example of the latter.

In 1908 when *Twining v. New Jersey,* 211 US 78, 29 S Ct 14, 53 L Ed 97, was decided the court apparently wholeheartedly subscribed to the historic approach—a fundamental question being, what was the common law of England in 1791 and what parts of it were well accepted in the colonies just prior to the American Revolution? The majority disagreed with Mr. Justice Harlan upon the answer to that historical question. The majority concluded that the privilege against self-incrimination was not a part of due process of law as practiced in England and the colonies, but rather, was merely a principle of the law of evidence. The majority held, therefore, that neither the Fourteenth Amendment by itself nor the Fourteenth Amendment incorporating the Fifth Amendment required the states to observe the right against self-incrimination.

Malloy v. Hogan, 378 US 1, 84 S Ct 1489, 12 L Ed2d 653 (1964), overruled *Twining v. New Jersey,* supra (211 US 78); however, neither the majority opinion nor the dissenting opinions mention the practice in England or the colonies. The Court held that a right is protected by the Due Process Clause if it is "'a fundamental right, essential to a fair trial.'" *Malloy v. Hogan,* supra (378 US at 6), quoting *Gideon v. Wainwright,* 372 US 335, 343-344, 83 S Ct 792, 9

L Ed2d 799, 804-805, 93 ALR2d 733 (1963). Whether such a right existed in England and had been adopted by the colonies by 1791 can, at least at present, be considered only important to historians.

If the historical approach is to prevail and a decision rendered by a judge on the assizes in the reign of Edward III determines the fundamental rights of Americans in 1969, other English and colonial practices, some less acceptable than a unanimous verdict of twelve, may rear up through the cobwebs and dust and claim similar recognition.[9]

In England, in the colonies, and in many of the states, a jury was required to be composed only of white male property owners. Devlin, supra, at 17; Lesser, supra, at 181-183; General Laws of Oregon 1843-1872, § 918, p 290. The United States Supreme Court undoubtedly would not hold that the Fourteenth Amendment requires the exclusion from juries of all persons other than white male property owners. However, based upon pure logic, if a unanimous verdict of twelve is required merely because that was the English practice adopted in the American colonies, it would seem to follow that jurors are, for the same reason, required to consist solely of property owners who are white and male.

The dissent concludes that in addition to being historically required, the right to be convicted only by a unanimous jury is a fundamental right.

The most plausible argument in support of the unanimity requirement is to the effect that, since one can be convicted only upon being found guilty beyond a reasonable doubt, a nonunanimous jury verdict cannot result in conviction because the disagreement with

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[9] Proffatt states that a decision in the time of Edward III held that a verdict of less than twelve was a nullity. Proffatt, Jury Trial, 113 (1877).

a guilty verdict by one or two of the twelve jurors is sufficient to establish that there is reasonable doubt as to the guilt of the defendant. Proffatt held this view. Proffatt, supra, at 117.

We respectfully decline to adopt this view. In our opinion a failure of one or two jurors to agree with the verdict of their fellow jurors is more likely to be caused by a failure of the dissenters to correctly understand the evidence or the court's instructions or by some extraneous cause having no relation to the quantum of proof. Proof beyond a reasonable doubt is not like a physical or chemical property the presence of which can be objectively ascertained. Unless the absence of proof is so conspicuous that a judge can hold "as a matter of law" that proof beyond a reasonable doubt has not been established, there is no test to determine whether such a degree of proof has been adduced. It does not appear that the nonconcurrence of one or two jurors signals such a defect.

3. We interpret the decisions of the United States Supreme Court to hold that due process requires the use of those procedures which are so fundamental that their absence impairs or discredits the fact-finding process. *Gideon v. Wainwright,* supra (372 US 335), is an example. We conclude that the absence of the unanimity requirement does not impair or discredit the fact-finding process.

The United States Supreme Court has specifically held that the right to be convicted only by a unanimous jury verdict is not "a fundamental right." The Republic of Hawaii had a system of criminal procedure which provided that indictment be by a judge, not a grand jury, and that nine of twelve jurors could return a verdict. When Hawaii ceded to the United States, the question of whether such provisions were

contrary to the United States Constitution was presented. The Court held they were not unconstitutional:

> "* * * We would even go farther, and say that most, if not all, the privileges and immunities contained in the bill of rights of the Constitution were intended to apply from the moment of annexation; but we place our decision of this case upon the ground that the two rights alleged to be violated in this case are not fundamental in their nature, but concern merely a method of procedure which sixty years of practice had shown to be suited to the conditions of the island, and well calculated to conserve the rights of their citizens to their lives, their property and their well-being." *Hawaii v. Mankichi,* 190 US 197, 217-218, 23 S Ct 787, 47 L Ed 1016 (1903).

Thirty-five years of practice have shown the Oregon procedure to be suited to Oregon conditions. The evidence, so far as we have been able to observe, is that the Oregon system has been as just as the system in jurisdictions requiring a unanimous verdict. Observers favoring unanimous verdicts concede that the lack of a unanimous requirement has not broken down justice in Oregon. Kalven and Zeisel, *The American Jury*, 48 Chi Bar Record 195, 201 (1967).

If unanimity were a "fundamental principle" of due process, "essential to a fair trial," one would expect harmony of opinion concerning the desirability of unanimity as a procedure, if not as a constitutional requirement. There is no such concord.

Unanimity has been attacked in the land of its birth, England, for over 100 years. The English constitutional historian Hallam stated the most repeated denunciation. He termed unanimity, "that preposterous relic of barbarism." Hallam, The Middle Ages (Supp), notes p 262, quoted with approval in Lesser, supra, at 187.

The Commission on the Courts of Common Law, appointed in 1830 as a result of the law reform movement of Bentham and others, reported: "'The interests of justice seem manifestly to require a change of law upon this subject [unanimity],'" quoted in Lesser, supra, at 187, note 28.[9] Reform took a little time; however, the requirement of unanimity was finally abolished by the Criminal Justice Act 1967, § 13.

Since the English are not supposed to treasure trial by jury as do we Americans, the recent abolition of the unanimity requirement by the English Parliament may not have significance for this country. However, criticism of unanimity as a desirable policy has been as great in the United States. Oregon's first legal scholar, Judge Mathew Deady, wrote:

> "But by far the greater portion of the unsatisfactory results of trial by jury is directly due to the perversion and abuse of the institution, brought about by improper legislation and practices concerning the selection and formation of juries, and the conduct of a trial with them. The most serious of these are:—
>
> "1. The rule requiring unanimity in the verdict of a jury;
>
> "* * * * *
>
> "The rule requiring a verdict to be the unanimous opinion of the jury ought to be changed, so that a majority may give a verdict." Deady, *Trial by Jury,* 17 Am L Rev 398, 400-401 (1883).

More recent and less provincial is the official draft of the American Law Institute's Code of Criminal Procedure, § 355, published in 1931:

> "In capital cases no verdict may be rendered unless all the jurors concur in it. In other cases of felony a verdict concurred in by five-sixths of the jurors, and in cases of misdemeanor a verdict con-

[9] It is not completely certain they were referring to criminal trials.

curred in by two-third of the jurors may be rendered."[6]

4. In addition to all the considerations before mentioned, we must remember that we are passing upon a provision of the Constitution of the State of Oregon. We consistently hold that we will "declare no act of the legislature void unless invalidity be shown beyond a reasonable doubt." *State v. Anthony,* 179 Or 282, 301, 169 P2d 587, cert den 330 US 826, 67 S Ct 865, 91 L Ed 1276 (1946); *State v. Collis,* 243 Or 222, 231, 413 P2d 53 (1966). Certainly, at least as much of a presumption of validity should be given to the State Constitution.

Because of the absence of any decision of the United States Supreme Court directly to the contrary, because the people of Oregon were acting within their power to regulate the incidents of criminal procedure when they adopted Art I, § 11, and because a unanimous verdict is not a "fundamental right, essential to a fair trial," we hold that the Oregon Constitution is not in violation of the Fourteenth Amendment.

[The judgment was reversed on other grounds, the discussion of which is omitted.]

GOODWIN, J., concurring in part and dissenting in part.

I dissent only from that part of the majority opinion which refuses to apply the federal interpretation of the Sixth Amendment to the State of Oregon.

For the first seventy-five years of its history, Oregon, in company with all the states except Louisiana, required a unanimous verdict in felony cases. Then,

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[6] Apparently, few states adopted the Institute's recommendation. Oregon, sometimes in the vanguard of legal reform, is an exception. Mr. Justice White states that only Oregon and Louisiana now permit less than unanimous verdicts. Duncan v. Louisiana, 391 US 145, 158, n 30, 88 S Ct 1444, 20 L Ed2d 491, rehr den 392 US 947, 88 S Ct 2270, 20 L Ed2d 1412 (1968).

in 1934, the people of Oregon amended Article I, § 11, of the state constitution. The principal reason stated for the amendment was that its adoption would tend to eliminate the evil of the hung jury and the consequent expense of the new trial.① There was no organized opposition to the referendum, and it passed. As noted by the majority, there was little reason to question the federal constitutionality of the 1934 amendment until *Maxwell v. Dow*, 176 US 581, 20 S Ct 448, 44 L Ed 597 (1900), was overruled by *Duncan v. Louisiana*, 391 US 145, 88 S Ct 1444, 20 L Ed 2d 491 (1968).

Duncan v. Louisiana, supra, has now held that trial by jury is fundamental to the American scheme of justice and that the Due Process Clause of the Fourteenth Amendment guarantees trial by jury to criminal defendants in state courts. While the court in *Duncan v. Louisiana* stopped short of a specific holding that a jury trial in a state court must be conducted according to federal standards, a subsequent per curiam opinion dealing in part with an Oregon case strongly suggests that state trials commenced after the date of *Duncan* must conform to federal standards, one of which requires a unanimous verdict to convict. *De Stefano v. Woods,* 392 US 631, 88 S Ct 2093, 20 L Ed 2d 1308 (1968).

When a state's own constitution is challenged as repugnant to the federal constitution, the state court should lay aside its presumptions favoring the constitutionality of statutes generally, and decide the federal supremacy question in light of the controlling precedents of the United States Supreme Court. See,

① The possibility that there might be a corrupt juror is sometimes tendered as an additional reason for eliminating the requirement of unanimity. See Kirkpatrick, *Should Jury Verdicts Be Unanimous in Criminal Cases?*, 47 Or L Rev 417, 421 (1968), for a well-reasoned statement of the case for unanimity.

e.g., *Reitman v. Mulkey,* 387 US 369, 87 S Ct 1627, 18 L Ed 2d 830 (1967). Accordingly, I believe the time has arrived for Oregon to recognize that the right to a unanimous jury verdict in a criminal trial is so fundamental to liberty under the American scheme of justice as to amount to a due-process right. I believe that our state constitution is out of step with the United States Constitution as the Sixth Amendment has been interpreted by the United States Supreme Court.

In contrast to the Oregon amendment allowing a verdict by a jury which contains unconvinced jurors, the federal system has always regarded the unanimous verdict as an essential ingredient of the Sixth Amendment's guarantee of a jury trial. *Thompson v. Utah,* 170 US 343, 350-351, 18 S Ct 620, 623, 42 L Ed 1061, 1066-1067 (1898); *Maxwell v. Dow,* 176 US at 586, 20 S Ct at 450-451, 44 L Ed at 599; *Patton v. United States,* 281 US 276, 288, 50 S Ct 253, 254, 74 L Ed 854, 858, 70 ALR 263 (1930); *Andres v. United States,* 333 US 740, 748, 68 S Ct 880, 884, 92 L Ed 1055, 1065 (1948).

The origin of the unanimity rule is not universally agreed upon. However, it is undisputed that for more than five centuries Englishmen knew that they could not be convicted of crime except by the unanimous verdict of twelve peers.[9] 1 W. Holdsworth, His-

[9] Recent legislation in England provides for a ten-to-two verdict in criminal cases. Criminal Justice Act of 1967, § 13. According to H. Kalven & H. Zeisel, *The American Jury: Notes for an English Controversy,* 48 Chi B Rec 195 (1967), Introductory Note, the legislation was the result of a discovery that there had been jury bribery in a few widely publicized criminal cases. This change was also suggested in this country in ALI Code of Criminal Procedure, § 355 (1931). However, with regard to felony cases, it was rejected in all the American common-law jurisdictions except Oregon. See the equivocal comments to Section 1.1(d) of the American Bar Association Standards Relating to Trial by Jury (Approved Draft 1968).

tory of the English Law 318 (3d ed rewritten 1922). Moreover, by the time of the American Revolution, the protection of unanimity in criminal cases was one of the Englishman's most cherished rights. See 4 Blackstone, Commentaries *349–*350. And see W. Forsyth, History of Trial by Jury 210–215 (new ed Morgan 1876); M. Hale, History of the Common Law 293 (and note at 299) (Runnington ed 1779); J. Thayer, Preliminary Treatise on Evidence at the Common Law (1898).

There is no reason to believe that the American colonists who adopted our Bill of Rights abandoned their English tradition with respect to trial by jury. Indeed, the evidence strongly suggests that the Sixth Amendment guarantee of a jury trial in all criminal cases was intended to incorporate all the elements of a jury trial that were deemed protective of individual liberty in this country and in England when the Constitution was adopted.

> "* * * Those elements were—(1) that the jury should consist of twelve men, neither more nor less; (2) that the trial should be in the presence and under the superintendence of a judge having power to instruct them as to the law and advise them in respect of the facts; and (3) that the verdict should be unanimous." *Patton v. United States,* 281 US at 288.

And see *Andres v. United States,* 333 US 740; *Maxwell v. Dow,* 176 US 581; *Thompson v. Utah,* 170 US 343; all supra.

Several important functional advantages result from the unanimity rule. If at least one juror disagrees with the majority, his opinion and the reasons for it must be heard and considered by the majority. He cannot be ignored, because until the majority persuades him to accept their view no verdict can be

returned. This undoubtedly decreases the likelihood of precipitancy and increases the opportunity for a full and adequate discussion of every issue about which there is reasonable doubt. Kalven & Zeisel, *The American Jury: Notes for an English Controversy,* 48 Chi B Rec 195, 201 (1967).

A guilty verdict in which only a majority of the jury can concur strongly suggests that the jury contains persons who are not convinced of the prisoner's guilt. Indeed, it may contain jurors who are firmly convinced of the person's innocence. These unpersuaded jurors may be merely incorrect; or they may be less susceptible to passion and prejudice than the majority, and therefore correct. It was to this latter point that Mr. Justice Story referred when he added the following footnote to a discussion of the reason for the institution of trial by jury:

> "A trial by jury is generally understood to mean * * * a trial by a jury of *twelve* men, impartially selected, who must *unanimously* concur in the guilt of the accused before a legal conviction can be had. Any law, therefore, dispensing with any of these requisites, may be considered unconstitutional." 2 J. Story, Commentaries on the Constitution of the United States § 1779, note 2 (5th ed 1891).

Judge Story said that the "object of trial by jury in criminal cases is, to guard against a spirit of oppression and tyranny on the part of rulers, and against a spirit of violence and vindictiveness on the part of the people. Indeed, it is often more important to guard against the latter than the former * * *." Id. at § 1780. Thus, because it requires the concurrence of the unimpassioned and the unprejudiced, the protection of unanimity increases the likelihood that the guilt of the accused will truly be established beyond a reasonable doubt.

The distinction between liberty and property has made some commentators, such as W. Forsyth, oppose the unanimity rule in civil cases, but wholeheartedly endorse it in criminal cases. W. Forsyth, supra at 210.

It may be argued that the state no longer prosecutes religious and political heretics, or at least that political and religious dissent is protected by the First Amendment, and that the citizen no longer needs the additional guarantee of his liberty which is provided by the unanimous jury.

Similarly, it may be argued that the criminal defendant in modern times has so many other constitutional protections that, regardless of the nature of the crime of which he is charged, he need have no fear of an unjust verdict by a majority of twelve of his fellow citizens so long as the jury is impartial.

It has been argued, as noted, that the requirement of unanimity allows irrational, perverse, or dishonest jurors to "hang juries," thereby obstructing justice and putting the state to the unnecessary expense of multiple trials. This argument, however, is unsupported by objective data, even though 48 states and the federal judicial system refused to follow Oregon's lead and have adhered to the unanimous-verdict rule.

However, assuming some validity in one or more of the arguments against unanimity, the fact remains that if a citizen can be convicted by only a majority (or, in Oregon, by a statutory fraction) of the jury, he has less protection than he had at common law. If Oregon can constitutionally provide for a ten-to-two verdict, it can, with equal constitutionality, provide for a verdict by a simple majority.

A local law making it easier for the state to convict is not necessarily bad. But a local law which deprives a person of a right that is fundamental to due

process of law cannot stand. Since the only kind of verdict recognized by courts operating under the Federal Constitution is the unanimous verdict, I am forced to conclude that unanimity has been held to be fundamental to federal due process. If there is no federal constitutional requirement of unanimity, there is, of course, no federal standard at all, except "fair procedure," for measuring the compliance of the various states with the demands of due process. I find it difficult to believe that the United States Supreme Court will permit fifty states to decide for themselves what constitutes a Sixth Amendment trial by jury.

Neither this court nor the United States Supreme Court has ever departed from common-law antecedents in order to take away a constitutional safeguard of personal liberty. It is true that we no longer insist that a jury be made up of male white property owners. But none of those common-law qualifications for jury service evolved to protect individual liberty. The unanimity rule is related directly to liberty.

In 1967, this court summarily denied habeas corpus relief to Frank Anthony Carcerano, who had belatedly challenged his 1962 conviction of armed robbery on the ground that the jury had been instructed on the ten-to-two verdict, in violation of the Federal Constitution. Before the United States Supreme Court on a petition for a writ of certiorari to the Supreme Court of Oregon, Carcerano subsequently advanced the argument that the Oregon jury trial had denied him due process of law under the United States Constitution. The United States Supreme Court granted certiorari, but eventually held that it need not decide the constitutional question in Carcerano's case because Carcerano had been tried before the publication of the decision in *Duncan v. Louisiana,* supra. *De Stefano v. Woods,* supra. In view of the specific holding that

Duncan v. Louisiana is not retroactive, and in view of strong suggestions in *De Stefano v. Woods* and more recently in *DeBacker v. Brainard*, 396 US 28, 90 S Ct 163, 24 L Ed 2d 148 (1969), that *Duncan v. Louisiana* would apply to future cases like the one at bar, I would prefer a decision today granting new trials in those relatively few cases in which guilty verdicts were rendered by divided juries after May 20, 1968, the date of the decision in *Duncan v. Louisiana,* supra. The majority is inviting a wholesale jail delivery several years from now if the United States Supreme Court adheres to the policy considerations recently applied in *Desist v. United States*, 394 US 244, 249, 89 S Ct 1030, 22 L Ed 2d 248 (1969), and holds that Oregon has been bound by *Duncan v. Louisiana* since the date it was decided.

I dissent, therefore, from the part of the majority opinion upholding the ten-to-two verdict.

McAllister and O'Connell, JJ., join in this concurring and dissenting opinion.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

~~No. 5398~~

ROBERT APODACA, *et al.*,

Petitioners,

v.

STATE OF OREGON,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF OREGON

REPLY BRIEF FOR PETITIONERS

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 5338

ROBERT APODACA, *et al.*,

Petitioners,

v.

STATE OF OREGON,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF OREGON

REPLY BRIEF FOR PETITIONERS

This reply brief is filed to respond to a single point advanced by the State of Oregon. Petitioners have argued that the unanimity requirement serves to ensure full jury deliberation before a guilty verdict is returned. Petitioners' Brief at 9-12. In response to this point, the State concedes that full deliberation is one of the essential ingredients of the trial by jury guaranteed by the Constitution, but argues that this purpose can be served by requiring a two-hour minimum period of deliberation before accepting a non-unanimous jury verdict. Respondent's Brief at 24-25.

Petitioners do not agree that a minimum period of deliberation adequately safeguards the historic function of the jury as a deliberative and consensus achieving body.[1] The knowledge that a divided verdict will be accepted after two hours is likely to encourage majority jurors to wait out the minimum period, rather than to discuss and debate the evidence with minority jurors as they must if they are to achieve unanimity.

But that is not the issue before this Court. Petitioners were convicted under a procedure which permits a non-unanimous verdict without any minimum period of deliberation. And in each of their particular cases, guilty verdicts were returned less than an hour after the jury retired. In the *Cooper* case, the record shows that the jury was out of the court room for 51 minutes.[2] In *Madden*, the jury was out for less than 30 minutes.[3] In *Apodaca*, the total period was 41 minutes.[4] These periods include time spent assembling in the jury room, electing a foreman, informing the court that the jury had reached its verdict, and reassembling in court. It is plain that in these cases the juries simply did not deliberate, or at most engaged in the barest possible discussion of the issues. Verdicts were rendered

---

[1] Nor, of course, would a provision that somehow did ensure full deliberation without unanimity serve the other important functions of the unanimity requirement—that of maintaining the historic standard of proof in criminal cases and of guaranteeing the integrity of the requirement that juries represent a cross-section of a community. See Brief for Petitioners, pp. 12-19.

[2] Transcript, *State v. Cooper*, at 281, 283.

[3] Affidavit of John E. Moore, Deputy District Attorney for Lane County, Oregon, reprinted as Appendix A to this Reply Brief. This affidavit and the affidavit cited in Footnote 4, both executed by trial counsel in the respective cases, have been lodged with the Clerk of this Court.

[4] Affidavit of David F. Bates, Esq., reprinted as Appendix B to this Reply Brief. See Footnote 3, *supra*.

over dissents, without the most rudimentary consideration of the views of the dissenting jurors.

If and when some American jurisdiction provides for a minimum period of deliberation *and* non-unanimous jury verdicts, it will be time enough for the Court to determine whether that procedure comports with the Sixth Amendment. But the convictions in the instant cases cannot be defended on the ground that under some other hypothetical procedure the convictions would not violate constitutional guarantees.

Respectfully submitted,

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Dated: February 1971

APPENDIX A

IN THE

CIRCUIT COURT OF THE STATE OF OREGON

FOR LANE COUNTY

THE STATE OF OREGON,
Plaintiff,

v.

JAMES ARNOLD MADDEN,
Defendant

Case No. 91211

AFFIDAVIT

STATE OF OREGON)
) ss.
County of Lane)

I, John E. Moore, having been duly sworn on oath hereby depose and say as follows:

That I am a member of the Oregon State Bar having been admitted to practice law in the State of Oregon on the 18th day of September, 1961.

That I am presently employed as a deputy district attorney for Lane County, Oregon, and that my job title is that of Chief Criminal Deputy within the Lane County District Attorney's Office.

That on December 10, 1968, I prosecuted James Arnold Madden in Lane County Circuit Court, Case Number 91211 on a charge of Grand Larceny.

That trial of the above matter consumed one day and that to the best of my recollection the jury empaneled to hear this case deliberated for a period of less than thirty (30) minutes in reaching its verdict.

/s/ John E. Moore
John E. Moore

Subscribed and sworn to before me this 3rd day of February, 1971.

/s/ Janet L. Bloom
Notary Public for Oregon
My Commission Expires: 5-22-71

APPENDIX B

IN THE

CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MARION

No. 66044

THE STATE OF OREGON,
Plaintiff,

v.

ROBERT APODACA,
Defendant.

AFFIDAVIT

STATE OF OREGON)
) ss.
County of Marion)

I, David F. Bates, being first duly sworn, depose and say, that I am an Attorney, practicing in the County of Marion, State of Oregon, that I was the attorney who represented the above named defendant before the Circuit Court of Marion County. The defendant was charged with the crime of ASSAULT WITH A DANGEROUS WEAPON.

That I entered certain time notations in my trial notes, that I have indicated the end of the giving of instructions to the jury at 3:54 on the 10th day of October, 1968, that I further indicated the jury is back with a verdict of "guilty" by 11 to 1 county, at 4:35 o'clock. This would indicate an interval not greater than forty-one minutes.

This Affidavit is made at the request of the office of Public Defender in and for the State of Oregon for the pur-

pose of showing the time the jury was out on its deliberation.

/s/ David F. Bates
Attorney for Defendant

Subscribed and sworn to before me this 4th day of February, 1971.

/s/ Edith M. Bates
Notary Public for Oregon
My commission expires: 8-17-71

BEST COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 69-5046

Supreme Court, U.S.
FILED
DEC 16 1971
E. ROBERT SEAVER, CLERK

ROBERT APODACA, *et al.*,

Petitioners,

—v.—

STATE OF OREGON,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF OREGON

BRIEF FOR AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 69-5046

ROBERT APODACA, *et al.*,

Petitioners,

—v.—

STATE OF OREGON,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF OREGON

BRIEF FOR AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

Interest of the *Amicus**

The American Civil Liberties Union, as *Amicus Curiae,* is deeply interested in the question presented by this case. How that question is answered will profoundly affect the content of two rights fundamental to all American citizens charged with committing major criminal acts: the right to jury trial and the right to a presumption of innocence until guilt is proven beyond a reasonable doubt. *Duncan* v. *Louisiana,* 391 U.S. 145 (1968); *In re Winship,* 397 U.S. 358 (1970). Because unanimity in jury verdicts is not only an essential element of both rights, but also provides the

* This brief is filed with consent of the parties. The letters of consent have been filed with the Clerk of the Court.

crucial link by which the former guarantees the latter, *Amicus* urges that the judgment of the Court of Appeals of Oregon be reversed.

Question Presented

Do the Sixth Amendment right to jury trial and the due process clauses of the Fifth and Fourteenth Amendments guarantee unanimity in jury verdicts?

Statement of the Case

The history of the case in No. 69-5046 is set forth in detail on pages 4-5 of the Brief for Petitioners. Petitioners were convicted of various felonies by the non-unanimous votes of 12-man juries, as authorized by the provisions of Article 1, Section 11 of the Oregon Constitution. On appeal, the Court of Appeals of Oregon rejected petitioners' constitutional claims, relying upon the opinion of the Supreme Court of Oregon in *State* v. *Gann*, 89 Ore. Adv. Sh. 853, 463 P. 2d 570 (1969). Review was denied by the Oregon Supreme Court.

Argument

The requirement of unanimity assures that the jury will carry out the historical functions to which it has been entrusted. It elicits the maximum amount of deliberation, and requires the full jury to consider and discuss whatever special insights each member may be able to bring to bear on the case. Without the unanimity requirement, informed discussion of the factual issues of a case might be cut short prematurely, or never reached, despite substantial disagreements over the nature or degree of guilt of the accused.

Moreover, the safeguards that community participation in juries provide against verdicts swayed by public sentiment or prejudice against unpopular or minority groups would be dangerously undercut by non-unanimous verdicts.

The unanimity requirement also is inextricably interwoven with the Constitutional standard of proof beyond a reasonable doubt. It is quite obvious that the prosecutor's burden of persuasion is lightened appreciably when less than complete agreement of the jurors is required for conviction. In a sense, an non-unanimous verdict is a contradiction in terms with the reasonable doubt standard, which, however difficult to define objectively, has been related historically to unanimity. Unanimity enhances that sense of shared community responsibility for the vital decisions entrusted to a jury that are so essential to the maintenance of the moral force of the criminal law, which lies behind the reasonable doubt standard. Cf. *In re Winship, supra.* Guilty verdicts returned over the dissent of a jury minority would undermine the confidence of individual citizens that the government will not successfully prosecute and imprison persons without proof of the utmost certainty.

For the above stated reasons, *Amicus* believes that the unanimity requirement is a procedure "necessary to an Anglo-American regime of ordered liberty," *Duncan* v. *Louisiana, supra,* 391 U.S. at 149, and therefore qualifies for protection under the Sixth Amendment and the Due Process Clauses of the Fifth and Fourteenth Amendments.

I.

The Sixth Amendment right to trial by jury guarantees unanimity in jury verdicts because unanimity is essential to the historical functions of the jury.

In *Duncan* v. *Louisiana, supra,* the Court held that in major criminal cases trial by jury "is fundamental to the American scheme of justice." The Court based its decision upon the historical and functional role that jury trial has played in preventing oppression by the state:

> . . . the jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power—a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges. 391 U.S. at 156.

In *Williams* v. *Florida,* 399 U.S. 78 (1970), the Court considered the question whether constitutional juries must consist of twelve members. After recognizing that the number of jurors historically had been fixed, with few exceptions, at twelve, the Court found that the history of the Constitution was uncertain as to whether the requirement of twelve had been incorporated by the Sixth Amendment. The Court then applied a functional test and held that criminal juries were not constitutionally limited to twelve members:

> The relevant inquiry, as we see it, must be the function that the particular feature performs and its relation to the purposes of the jury trial. Measured by this standard, the 12 man requirement cannot be re-

garded as an indispensable component of the Sixth Amendment. 399 U.S. 78, 99-100.

It is precisely on this functional basis that the unanimity requirement must be retained. Without unanimity, the role of the jury as a deliberative body representative of a cross-section of the community and protective of the rights of unpopular defendants against the prejudices of majority public opinion would be seriously undermined. This position was implicitly recognized in the *Williams* case, *supra,* when the Court distinguished its holding regarding 12 man juries from the issue presented in the instant case:

> . . . we find little reason to think that these goals are in any meaningful sense less likely to be achieved when the jury numbers six, than when it numbers 12—*particularly if the requirement of unanimity is retained.* 399 U.S. at 100. (Emphasis supplied.)

The Court added in a footnote that unanimity, unlike the 12-man requirement, "may well serve an important role in the jury function." *Supra* at 100, fn. 46. We believe that the suggestion of this Court in the *Williams* case should be adopted as the holding in the instant case.

A. *Unanimity Assures Full and Complete Jury Deliberation.*

The primary function of a jury is to interpose the reasoned decision of ordinary citizens between the power of the state and the individual, thereby preventing the use of arbitrary power and coercion by the authorities. *Duncan* v. *Louisiana, supra.* The major risk that is run by entrusting such decisions to a jury of layman is that in-

dividual jurors, as untrained fact-finders, may be more likely to err than a trained judge. This problem is accentuated when the trial deals with issues or individuals about whom there is considerable public controversy.[1] It is to minimize these risks that juries have been structured to ensure maximum deliberation and consideration of all the intricate issues developed at trial.

> The importance of this comparison and discussion is particularly great in the case of untrained judges .... [T]he verdict ultimately represents general impressions founded on conclusions of which many are forgotten in the course of a trial; and though the value of such general impressions is often underrated, there can be no doubt that their importance depends, if not principally, at least to a great extent, on their being checked by and compared and found to correspond with, the general impressions of others. J. F. Stephen, *A General View of the Criminal Law of England* 221 (1863).

Unanimity is the primary device by which such careful deliberation is maximized. It ensures that the opinion of each member of the jury is given full and equal weight, and allows each juror to present interpretations of factual situations that might not otherwise be considered by his co-jurors. It "furnishes a safeguard against precipitancy and insures a full and adequate discussion of every question which can fairly admit of doubt." W. Forsyth, *History of Trial by Jury* 204 (2d Ed. Morgan 1875).

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[1] See *Marshall* v. *United States*, 360 U.S. 310 (1959); *Turner* v. *State of Louisiana*, 379 U.S. 466 (1965); 3 Story, *Commentaries on the Constitution* at 653.

Without unanimity, deliberation might be cut short prematurely, or be dispensed with entirely, without due consideration of the doubts and insights of a minority of the jury. The dissenting jurors may be just those who can lend a special insight into the facts of the case, or those whose strength of character enables them to see the issues objectively despite the pressures of popular opinion. See Comment, "Should Jury Verdicts Be Unanimous in Criminal Cases," 47 *Ore. L. Rev.* 417, 424 (1968). To cut short or to eliminate their opportunity to reason with their associates would be to undermine the traditional protective role of the jury.

B. *Unanimity Gives Meaning to the Requirement That Juries Reflect a Broad Cross-Section of the Community.*

Related to the protection of the jury to serve as a buffer between the accused and the state is the requirement that juries be drawn from a pool composed of a representative cross-section of the community. *Norris* v. *Alabama,* 294 U.S. 587 (1935); *Whitus* v. *Georgia,* 385 U.S. 545 (1967). This insures that the special perspectives that can be imparted to the facts and testimony of a trial by an individual from a particular ethnic, racial, or social background will not be omitted arbitrarily from the jury's deliberations.[2] It also helps assure that a defendant who is a member of an unpopular or minority group is not victimized by the possible prejudices of a jury.[3]

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[2] See Note, "The Jury: A Reflection of the Prejudices of the Community," 20 *Hastings Law Journal* 1417, 1419 (1969).

[3] A respected University of Chicago Law School study found that white jurors in criminal trials tend to be significantly more sympa-

Without the unanimity requirement, both of these safeguards would be undercut. It would be easier—perhaps commonplace—for a jury to ignore the viewpoints of minority group members.[4] Worse, a jury could convict on the basis of its prejudices in the face of exculpating evidence and over the dissent of jurors representative of the group against whom the prejudice is directed. In such a case, the community representation element of the right to jury trial would become a hollow guarantee.

C. *The Requirement of Unanimity Is Not Outweighed by Any Legitimate States Interests.*

The reasons usually advanced for abandoning unanimous jury verdicts are that it is necessary to avoid obstruction by obstinate jurors and that it relieves the state of the economic burden of retrying cases that resulted in hung juries. See, Comment, "Should Jury Verdicts be Unanimous in Criminal Cases," 47 *Ore. L. Rev.* 417 (1968). But the University of Chicago jury studies have shown that it is a rare case where a juror will prevent a verdict in the face of clear evidence:

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thetic to white than to black defendants. This is reflected in higher rates of conviction and stiffer sentences for black defendants, especially where there are no blacks on the jury. Kalven & Zeisel, *The American Jury* (1966) 210-211.

[4] Professor Zeisel has shown that "a majority verdict requirement is far more effective in nullifying the potency of minority viewpoints than is the outright reduction of a jury to a size equivalent to the majority that is allowed to agree on a verdict." Zeisel, "The Diminution of the Federal Jury," 38 *U. Chi. L. Rev.* 710, 722 (1971). For the statistical analysis underlying these conclusions, see *id.*, pp. 722-23.

> The most likely explanation for the 10:2 or 11:1 deadlocked juries is that it is a response to genuine difficulties in the case.[5]

Moreover, the frequency of hung juries is not that substantial. Only 5.6% of criminal trials result in hung juries in unanimous-verdict jurisdictions, as opposed to 3.1% in jurisdictions where unanimity is not required.[6] This represents a minor savings indeed, and any trifling economies that may be gained (such as shortened periods of jury deliberation or easier convictions) would be achieved by undermining those very functions of the jury that were so essential to this Court's decision in *Duncan* v. *Louisiana, supra.*

As Justice Black said in what is now recognized to be a classic statement:

> Trifling economies . . . . have not generally been thought sufficient reason for abandoning our great constitutional safeguards aimed at protecting freedom and other basic human rights of incalculable value. Cheap, easy convictions were not the primary concern of those who adopted the Constitution and the Bill of Rights. Every procedural safeguard they established purposely made it more difficult for the government to convict those it accused of crimes. On their scale of value justice occupied at least as high a position as economy. *Green* v. *United States,* 356 U.S. 165, 216 (1958) (dissenting opinion).

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[5] Kalven & Zeisel, "The American Jury: Notes for an English Controversy," 48 *Chi. Bar Rec.* 195, 201 (1967).

[6] *Id.* at 200. Kalven & Zeisel, *The American Jury, supra* at 453, 461.

II.

Unanimity in jury verdicts is required to effectuate the reasonable doubt standard of guilt, which is embodied in the due process clauses of the Fifth and Fourteenth Amendments.

The Court has held that due process requires that "society . . . should not condemn a man for commission of a crime when there is reasonable doubt about his guilt." *In re Winship, supra,* 397 U.S. at 363-64. The unanimity requirement is an essential ingredient of this right, and assures that the standard will be correctly applied.

A. *Unanimity Insures That Each Individual Juror Will Apply the Reasonable Doubt Standard.*

Jury deliberation enables the members to gain exposure to the insights of their co-jurors. Thus, each juror may be confronted with an analysis of the factual issues that he would not have entertained on his own.

This jury dynamic gives meaning to the reasonable doubt standard; it provides the juror, an untrained layman, with a broad perspective so that in his deliberations he may more nearly approximate the law's standard of a "reasonable man". Without such exposure, the juror would be likely to consider only *his* doubts, rather than all reasonable doubts, in deciding the issue of guilt.

Unanimity serves as the vital mechanism by which the reasonable doubt standard is applied by each individual juror. Without unanimity, the full and meaningful deliberation that is essential to the reasonable doubt standard would be cut short or eliminated. (Compare *supra,*

pp. 5-7.) Justice Goodwin of the Supreme Court of Oregon recognized this process in dissenting from that Court's opinion in *State* v. *Gann,* 89 Ore. Adv. Sh. 853, 463 P.2d 570 (1969), which upheld the Oregon statute at issue here:

> [The unanimity rule] undoubtedly decreases the likelihood of precipitancy and increases the opportunity for a full and adequate discussion of every issue about which there is a reasonable doubt . . . Thus, because it requires the concurrence of the unimpassioned and the unprejudiced, unanimity increases the likelihood that the guilt of the accused will truly be established beyond a reasonable doubt. 463 P.2d at 584.

B. *Unanimity Precludes a Conviction Unless the Jury as a Whole Entertains No Reasonable Doubt of the Guilt of the Accused.*

Each juror in a criminal trial is the equal of his co-jurors and is as likely as they to embody the standard of the "reasonable man." Thus, as long as one juror votes for acquittal, there is a reasonable doubt of guilt; that one dissenting vote can no more be dismissed as unreasonable than can the eleven votes of the majority.

> . . . The unanimity of a verdict in a criminal case is inextricably interwoven with the required measure of proof. To sustain the validity of a verdict by less than all the jurors is to destroy this test of proof for there cannot be a verdict supported by proof beyond a reasonable doubt if one or more jurors remain reasonably in doubt as to guilt. It would be a contradiction in terms . . .

Hibdon v. *United States,* 204 F.2d 834, 838 (6th Cir. 1953). Accord: *United States* v. *Fioravanti,* 412 F.2d 407, 418-419 (3d Cir. 1969); *Billeci* v. *United States,* 184 F.2d 394, 403 (D.C. Cir. 1950).

It has been claimed that the *Hibdon* case confused the application of the reasonable doubt standard, and that that standard properly is applicable only to the individual decisions of each juror and not to the decision-making of the jury as a unified body. Comment, "Waiver of Jury Unanimity—Some Doubts About Reasonable Doubt," 21 *U. Chi. L. Rev.* 438 (1954). But this distinction contradicts historical experience. The reasonable doubt standard has been applied in the context of recognition of the right to unanimous verdicts in jury trials.[7] This is not coincidence; unanimity has been a tacit assumption underlying the use of the reasonable doubt standard in jury trials.

Moreover, the criticism of the *Hibdon* case does not hold up analytically. The reasonable doubt standard is closely related to the prosecution's burden of persuasion in criminal trials; it "provides concrete substance for the presumption

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[7] The "demand for a higher degree of persuasion in criminal cases was recurrently expressed from ancient times, [although] its crystallization into the formula 'beyond a reasonable doubt' seems to have occurred as late as 1798." C. McCormick, *Evidence* §321, pp. 681-682 (1954).

The unanimity rule dates back to at least the latter third of the fourteenth century—*Anonymous Case,* 41 *Lib. Assisarum* 11—and was recognized by all the authors of the major common law treatises, 4 W. Blackstone, *Commentaries on the Laws of England* (1765) 349-350 (Cooley ed. 1899); Matthew Hale, *The History of the Common Law of England* (1713) at 261 and 263; 1 J. Chitty, *A Practical Treatise on the Criminal Law* (1816) at 635-36; 3 J. Story, *Commentaries on the Constitution of the United States* (1833) at 652, and by the decisions of this Court. See *Andres* v. *United States,* 333 U.S. 740 (1948); *Thompson* v. *Utah,* 170 U.S. 343 (1898) (dictum); *Patton* v. *United States,* 281 U.S. 276, 288 (1930) (dictum).

of innocence . . . " *In re Winship, supra* at 363. It is "bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free." *In re Winship, supra* at 372 (concurring opinion of Justice Harlan). Particularly in view of this Court's decision in *Williams* v. *Florida, supra,* that 12-man juries are not constitutionally required, it is essential that unanimity be maintained to protect against erosion of that principle. To do away with unanimity obviously would lessen the burden of the prosecution. As Justice Harlan noted in *Williams,* "Can it be doubted that a unanimous jury of 12 provides a greater safeguard than a majority vote of six?" 399 U.S. at 126.

C. *Jury Unanimity Is Essential to Public Confidence in the Judicial System.*

The utility and legitimacy of any legal system is directly related to the degree of public confidence in the way in which that system works. If citizens believe that the law is merely an extension of the sovereign power and can be used to imprison people at the arbitrary whim of the state, then they will be unwilling to entrust disputes between themselves and the government to settlement by the courts. Even if citizens do submit to the judicial power, such beliefs would embitter the political climate of the nation.

Considerations such as these partly lay behind this Court's decision in *In re Winship:*

> Moreover, use of the reasonable-doubt standard is indispensible to command the respect and confidence of the community in applications of the criminal law. It is critical that the moral force of the criminal law not be

> diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned. It is also important in our free society that every individual going about his affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper fact finder of his guilt with utmost certainty. 397 U.S. at 364.

Unanimity is probably the most important element of the reasonable doubt standard in sustaining the legitimacy of the criminal law in the eyes of the public. A layman may be unclear as to the differences between proof beyond a reasonable doubt and proof by a preponderance of the evidence, but he can understand that one cannot be convicted and incarcerated for a crime without the unanimous concurrence of twelve of his peers. Unanimous verdicts lend an air of moral certainty to factual decisions. Were people to be condemned over the dissent of jurors, it would raise grave doubts that the decision to convict was the right one.

Thus, it is particularly disturbing that split verdicts are rendered in at least 25% of the criminal cases in Oregon. Kalven & Zeisel, "The American Jury: Notes for an English Controversy," 48 *Chi. Bar Rec.* 195, 201 (1967). Public disagreement over the decisions of criminal juries in such a high ratio of cases is bound to have an adverse effect on public confidence that justice is being done. Moreover, as the statistics of the Chicago jury study show,[8] the overwhelming majority of the split verdict in Oregon could ultimately be resolved by unanimous verdict.

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[8] See commentary accompanying fn. 6, p. 9, *supra*.

CONCLUSION

The requirement of unanimity is an essential element of the constitutional rights to a jury trial and to the reasonable doubt standard of guilt in criminal trials. It has been historically recognized for centuries at common law. There are no important state interests to justify its abandonment.

For these reasons, *Amicus* respectfully urges that the decision of the Court of Appeals of Oregon be reversed.

Respectfully submitted,

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NOTE: Where it is deemed desirable, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

APODACA ET AL. *v.* OREGON

CERTIORARI TO THE COURT OF APPEALS OF OREGON

No. 69–5046. Argued March 1, 1971—Reargued January 10, 1972—Decided May 22, 1972

Petitioners, who were found guilty of committing felonies, by less-than-unanimous jury verdicts, which are permitted under Oregon law in noncapital cases, claim that their convictions, upheld on appeal, contravene their right to trial by jury under the Sixth and Fourteenth Amendments. *Held:* The judgment is affirmed. Pp. 6––.

89 Ore. 939, 462 P. 2d 691, affirmed.

MR. JUSTICE WHITE, joined by THE CHIEF JUSTICE, MR. JUSTICE BLACKMUN, and MR. JUSTICE REHNQUIST, concluded that:

1. The Sixth Amendment guarantee of a jury trial, made applicable to the States by the Fourteenth (*Duncan* v. *Louisiana*, 391 U. S. 145), does not require that the jury's vote be unanimous. Pp. 6–8.

(a) The Amendment's essential purpose of "interpos[ing] between the accused and his accuser . . . the commonsense judgment of a group of laymen" representative of a cross section of the community, *Williams* v. *Florida*, 399 U. S. 78, 100, is served despite the absence of a unanimity requirement. Pp. 6–7.

(b) Petitioners' argument that the Sixth Amendment requires jury unanimity in order to effectuate the reasonable-doubt standard otherwise mandated by due process requirements is without merit since that Amendment does not require proof beyond a reasonable doubt at all. Pp. 7–8.

2. Jury unanimity is not mandated by the Fourteenth Amendment requirements that racial minorities not be systematically excluded from the jury-selection process; even when racial minority members are on the jury, it does not follow that their views will not be just as rationally considered by the other jury members as would be the case under a unanimity rule. Pp. 8–9.

Syllabus

MR. JUSTICE POWELL concluded that:

1. Although on the basis of history and precedent the Sixth Amendment mandates unanimity in a *federal* jury trial, the Due Process Clause of the Fourteenth Amendment, while requiring States to provide jury trials for serious crimes, does not incorporate all the elements of a jury trial within the meaning of the Sixth Amendment and does not require jury unanimity. Oregon's "ten of twelve" rule is not violative of due process. Pp. 4–13.

2. Nor is the Oregon provision inconsistent with the due process requirement that a jury be drawn from a representative cross section of the community as the jury majority remains under the duty to consider the minority viewpoint in the course of deliberation, and the usual safeguards exist to minimize the possibility of jury irresponsibility. Pp. 13–16.

WHITE, J., announced the Court's judgment and delivered an opinion in which BURGER, C. J., and BLACKMUN and REHNQUIST, JJ., joined. BLACKMUN, J., filed a concurring opinion. See No. 69–5035, *Johnson* v. *Louisiana*. POWELL, J., filed an opinion concurring in the judgment. See *ibid.* DOUGLAS, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined. See *ibid.* BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined. See *ibid.* STEWART, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined. MARSHALL, J., filed a dissenting opinion, in which BRENNAN, J., joined. See *ibid.*

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 69–5046

Robert Apodaca, Harry Morgan Cooper, Jr., and James Arnold Madden, Petitioners, *v.* Oregon.

On Writ of Certiorari to the Court of Appeals of Oregon.

[May 22, 1972]

MR. JUSTICE WHITE announced the judgment of the Court and an opinion in which THE CHIEF JUSTICE, MR. JUSTICE BLACKMUN, and MR. JUSTICE REHNQUIST joined.

Robert Apodaca, Henry Morgan Cooper, Jr., and James Arnold Madden were convicted respectively of assault with a deadly weapon, burglary in a dwelling, and grand larceny before separate Oregon juries, all of which returned less than unanimous verdicts. The vote in the cases of Apodaca and Madden was 11–1, while the vote in the case of Cooper was 10–2, the minimum requisite vote under Oregon law for sustaining a conviction.[1] After their convictions had been affirmed by the Oregon Court of Appeals, 89 Ore. 939, 462 P. 2d 691 (1969), and review had been denied by the Supreme Court of

[1] Ore. Const. Art. I, § 11, reads in relevant part:

"In all criminal prosecutions, the accused shall have the right to public trial by an impartial jury in the county in which the offense shall have been committed; . . . provided, however, that any accused person, in other than capital cases, and with the consent of the trial judge, may elect to waive trial by jury and consent to be tried by the judge of the court alone, such election to be in writing; provided, however, that in the circuit court ten members of the jury may render a verdict of guilty or not guilty, save and except a verdict of guilty of first degree murder, which shall be found only by a unanimous verdict, and not otherwise; . . . ."

Oregon, all three sought review in this Court upon a claim that conviction of crime by a less than unanimous jury violates the right to trial by jury in criminal cases specified by the Sixth Amendment and made applicable to the States by the Fourteenth. See *Duncan* v. *Louisiana*, 391 U. S. 145 (1968). We granted certiorari to consider this claim, 400 U. S. 901 (1970), which we now find to be without merit.

In *Williams* v. *Florida*, 399 U. S. 78 (1970), we had occasion to consider a related issue: whether the Sixth Amendment's right to trial by jury requires that all juries consist of 12 men. After considering the history of the 12-man requirement and the functions it performs in contemporary society, we concluded that it was not of constitutional stature. We reach the same conclusion today with regard to the requirement of unanimity.

I

Like the requirement that juries consist of 12 men, the requirement of unanimity arose during the Middle Ages[2]

[2] The origins of the unanimity rule are shrouded in obscurity, although it was only in the latter half of the 14th century that it became settled that a verdict must be unanimous. See 1 W. Holdsworth, A History of English Law 318 (1927); Thayer, The Jury and its Development, 5 Harv. L. Rev. 249, 296 (1892). At least four explanations might be given for the development of unanimity. One theory is that unanimity developed to compensate for the lack of other rules insuring that a defendant received a fair trial. See L. Orfield, Criminal Procedure from Arrest to Appeal 347–351 (1947); Haralson, Unanimous Jury Verdicts, 21 Miss. L. J. 191 n. 24 (1950). A second theory is that unanimity arose out of the practice in the ancient mode of trial by compurgation of adding to the original number of 12 compurgators until one party had 12 compurgators supporting his position; the argument is that when this technique of afforcement was abandoned, the requirement that one side obtain the votes of all 12 jurors remained. See P. Devlin, Trial by Jury 48–49 (1956); Ryan, Less than Unanimous Jury Verdicts in Criminal Trials, 58 J. Crim. L., Crim. & Police Sci. 211, 213 (1967). A third possibility is that unanimity developed because

and had become an accepted feature of the common-law jury by the 18th century.[3] But, as we observed in *Williams*, "the relevant constitutional history casts con-

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early juries, unlike juries today, personally had knowledge of the facts of a case; the medieval mind assumed there could be only one correct view of the facts, and, if either all the jurors or only a minority thereof declared the facts erroneously, they might be punished for perjury. See T. Plucknett, A Concise History of the Common Law 131 (5th ed. 1956); Thayer, *supra*, at 297. Given a view that minority jurors were guilty of criminal perjury, the development of a practice of unanimity would not be surprising. The final explanation is that jury unanimity arose out of the medieval concept of consent. Indeed, "[t]he word consent (*consensus*) carried with it the idea of *concordia* or unanimity. . . ." M. Clarke, Medieval Representation and Consent 251 (1936). Even in 14th century Parliaments there is evidence that a majority vote was deemed insufficient to bind the community or individual members of the community to a legal decision, see *id.*, at 335–336; Plucknett, The Lancastrian Constitution, in R. Seton-Watson ed., Tudor Studies Presented to A. F. Pollard 161, 169–170 (1924); a unanimous decision was preferred. It was only in the 15th century that the decision-making process in Parliament became avowedly majoritarian, see 1 K. Pickthorn, Early Tudor Government: Henry VII 93 (1967), as the ideal of unanimity became increasingly difficult to attain. See M. Clarke, *supra*, at 266–267. For evidence in 18th century America of a similar concern that decisions binding on the community be taken unanimously, see Zuckerman, The Social Context of Democracy in Massachusetts, 25 William & Mary Q. (3d ser.) 523, 526–527, 540–544 (1968).

[3] See 3 W. Blackstone, Commentaries on the Laws of England 375–376 (6th ed. 1775); 3 St. G. Tucker, Blackstone's Commentaries 375–376 (1803). Four 18th-century state constitutions provided explicitly for unanimous jury verdicts in criminal cases, see N. C. Const. of 1776, Art. IX, in 5 F. Thorpe, Federal and State Constitutions 2787 (1909); Pa. Const. of 1786, Art. IX, in 5 *id.*, at 3083; Vt. Const. of 1786, Art. XI, in 6 *id.*, at 3753; Va. Const. of 1776, § 8, in 7 *id.*, at 3813; while other 18th-century state constitutions provided for trial by jury according to the course of the common law, see Md. Const. of 1776, Art. III, in 3 *id.*, at 1686, or that trial by jury would remain "inviolate," see Ga. Const. of 1777, Art. LXI, in 2 *id.*, at 785; Ky. Const. of 1792, Art. XII, § 6, in 3 *id.*, at 1274; N. Y. Const. of 1777, Art. XLI, in 5 *id.*, at 2637; Tenn. Const. of 1796, Art. XI, § 6,

siderable doubt on the easy assumption[4] . . . that if a given feature existed in a jury at common law in 1789, then it was necessarily preserved in the Constitution." *Id.*, at 92–93. The most salient fact in the scanty history of the Sixth Amendment, which we reviewed in full in *Williams*, is that, as it was introduced by James Madison in the House of Representatives, the proposed Amendment provided for trial

> "by an impartial jury of the freeholders of the vicinage, with the requisite of unanimity for conviction, of the right of challenge and other accustomed requisites. . . ." 1 Annuals of Cong. 435 (1789).

Although it passed the House with little alteration, this proposal ran into considerable opposition in the Senate,

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in 6 *id.*, at 3422; be "confirmed," see N. J. Const. of 1776, Art. XXII, in 5 *id.*, at 2598; or remain "as heretofore." See Del. Const. of 1792, Art. I, § 4, in 1 *id.*, at 569· Ky. Const. of 1792, Art. XII, § 6, in 3 *id.*, at 1274; S. C. Const. of 1790, Art. IX, § 6. See also *Apthorp* v. *Backus*, 1 Kirby 407, 416–417 (Con. 1788); *Grinnell* v. *Phillips*, 1 Mass. 530, 542 (1805). Although unanimity had not been the invariable practice in 17th-century America, where majority verdicts were permitted in the Carolinas, Connecticut, and Pennsylvania, see *Williams* v. *Florida*, *supra*, at 98 n. 45, the explicit constitutional provisions, particularly of States such as North Carolina and Pennsylvania, the apparent change of practice in Connecticut, and the unquestioning acceptance of the unanimity rule by text writers such as St. George Tucker indicate that unanimity became the accepted rule during the 18th century, as Americans became more familiar with the details of English common law and adopted those details in their own colonial legal systems. See generally Murrin, The Legal Transformation: The Bench and Bar of Eighteenth-Century Massachusetts, in S. Katz ed., Colonial America: Essays in Politics and Social Development 415 (1970). See also F. Heller, The Sixth Amendment 13–21 (1951).

[4] See *Andres* v. *United States*, 333 U. S. 740, 748 (1948); *Maxwell* v. *Dow*, 176 U. S. 581, 586 (1900) (dictum). Cf. *Springville* v. *Thomas*, 166 U. S. 707 (1897); *American Publishing Co.* v. *Fisher*, 166 U. S. 464 (1897).

particularly with regard to the vicinage requirement of the House version. The draft of the proposed Amendment was returned to the House in considerably altered form, and a conference committee was appointed. That committee refused to accept not only the original House language but also an alternate suggestion by the House conferees that juries be defined as possessing "the accustomed requisites." Letter from James Madison to Edmund Pendleton, Sept. 23, 1789, in 1 Letters and Other Writings of James Madison 492–493 (1865). Instead, the Amendment that ultimately emerged from the committee and then from Congress and the States provided only for trial

> "by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law. . . ."

As we observed in *Williams,* one can draw conflicting inferences from this legislative history. One possible inference is that Congress eliminated references to unanimity and to the other "accustomed requisites" of the jury because those requisites were thought already to be implicit in the very concept of jury. A contrary explanation, which we found in *Williams* to be the more plausible, is that the deletion was intended to have some substantive effect. See 399 U. S., at 96–97. Surely one fact that is absolutely clear from this history is that, after a proposal had been made to specify precisely which of the common-law requisites of the jury were to be preserved by the Constitution, the Framers explicitly rejected the proposal and instead left such specification to the future. As in *Williams,* we must accordingly consider what is meant by the concept "jury" and determine whether a feature commonly associated with it is constitutionally required. And, as in *Williams,* our in-

ability to divine "the intent of the Framers" when they eliminated references to the "accustomed requisites" requires that in determining what is meant by a jury we must turn to other than purely historical considerations.

II

Our inquiry must focus upon the function served by the jury in contemporary society. Cf. *Williams* v. *Florida, supra,* at 99–100. As we said in *Duncan,* the purpose of trial by jury is to prevent oppression by the Government by providing a "safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge." *Duncan* v. *Louisiana, supra,* at 156. "Given this purpose, the essential feature of a jury obviously lies in the interposition between the accused and his accuser of the commonsense judgment of a group of laymen. . . ." *Williams* v. *Florida, supra,* at 100. A requirement of unanimity, however, does not materially contribute to the exercise of this commonsense judgment. As we said in *Williams,* a jury will come to such a judgment as long as it consists of a group of laymen representative of a cross section of the community who have the duty and the opportunity to deliberate, free from outside attempts at intimidation, on the question of a defendant's guilt. In terms of this function we perceive no difference between juries required to act unanimously and those permitted to convict or acquit by votes of 10 to two or 11 to one. Requiring unanimity would obviously produce hung juries in some situations where nonunanimous juries will convict or acquit.[5] But in either case, the interest of the defendant

[5] The most complete statistical study of jury behavior has come to the conclusion that when juries are required to be unanimous, "the probability that an acquittal minority will hang the jury is about as great as that a guilty minority will hang it." H. Kalven & H. Zeisel, The American Jury 461 (1966).

in having the judgment of his peers interposed between himself and the officers of the State who prosecute and judge him is equally well served.

III

Petitioners nevertheless argue that unanimity serves other purposes constitutionally essential to the continued operation of the jury system. Their principal contention is that a Sixth Amendment "jury trial" made mandatory on the States by virtue of the Due Process Clause of the Fourteenth Amendment, *Duncan* v. *Louisiana, supra,* should be held to require a unanimous jury verdict in order to give substance to the reasonable doubt standard otherwise mandated by the Due Process Clause. See *In re Winship,* 397 U. S. 358, 363–364 (1970).

We are quite sure, however, that the Sixth Amendment itself has never been held to require proof beyond a reasonable doubt in criminal cases. The reasonable doubt standard developed separately from both the jury trial and the unanimous verdict. As the Court noted in the *Winship* case, the rule requiring proof of crime beyond a reasonable doubt did not crystallize in this country until after the Constitution was adopted. See *id.,* at 361.[6] And in that case, which held such a burden

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[6] For the history of the reasonable doubt requirement, see generally C. McCormick, Evidence § 2497 (1954); 9 Wigmore, Evidence § 2497 (3d ed. 1940); May, Reasonable Doubt in Civil and Criminal Cases, 10 Am. L. Rev. 642, 651–660 (1876). According to May and McCormick, the requirement of proof beyond a reasonable doubt first crystalized in the case of *Rex* v. *Finney,* a high treason case tried in Dublin in 1798 and reported in MacNally, Rules of Evidence on Pleas of the Crown 2 (1802). Confusion about the rule persisted in the United States in the early 19th century, where it was applied in civil as well as criminal cases, see, *e. g., Ropps* v. Barker, 4 Pick. (21 Mass.) 239, 242 (1826); it was only in the latter half of the century that the reasonable doubt standard ceased to be applied in civil cases, see *Ellis* v. *Buzzell,* 60 Me. 207 (1872), and

of proof to be constitutionally required, the Court purported to draw no support from the Sixth Amendment.

Petitioners' argument that the Sixth Amendment requires jury unanimity in order to give effect to the reasonable doubt standard thus founders on the fact that the Sixth Amendment does not require proof beyond a reasonable doubt at all. The reasonable doubt argument is rooted, in effect, in due process and has been rejected in *Johnson* v. *Louisiana, ante.*

IV

Petitioners also cite quite accurately a long line of decisions of this Court upholding the principle that the Fourteenth Amendment requires jury panels to reflect a cross section of the community. See, *e. g., Whitus* v. *Georgia,* 385 U. S. 545 (1967); *Smith* v. *Texas,* 311 U. S. 128 (1940); *Norris* v. *Alabama,* 394 U. S. 587 (1935); *Strauder* v. *West Virginia,* 100 U. S. 303 (1880). They then contend that unanimity is a necessary precondition for effective application of the cross section requirement, because a rule permitting less than unanimous verdicts will make it possible for convictions to occur without the acquiescence of minority elements within the community.

There are two flaws in this argument. One is petitioners' assumption that every distinct voice in the community has a right to be represented on every jury and a right to prevent conviction of a defendant in any case. All that the Constitution forbids, however, is systematic exclusion of identifiable segments of the community from jury panels and from the juries ultimately drawn from those panels; a defendant may not, for example, challenge the makeup of a jury merely because no members

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that American courts began applying it in its modern form in criminal cases. See *Commonwealth* v. *Webster,* 5 Cush. (59 Mass.) 295, 320 (1850). See generally May, *supra.*

of his race are on the jury, but must prove that his race has been systematically excluded. See *Swain* v. *Alabama*, 380 U. S. 202, 208–209 (1965); *Cassell* v. *Texas*, 339 U. S. 282, 286–287 (1950); *Akins* v. *Texas*, 325 U. S. 398, 403–404 (1945); *Ruthenberg* v. *United States*, 245 U. S. 480 (1918). No group, in short, has the right to block convictions; it has only the right to participate in the overall legal processes by which criminal guilt and innocence are determined.

We also cannot accept petitioners' second assumption—that minority groups, even when they are represented on a jury, will not adequately represent the viewpoint of those groups simply because they may be outvoted in the final result. They will be present during all deliberations, and their views will be heard. We cannot assume that the majority of the jury will refuse to weigh the evidence and reach a decision upon rational grounds, just as it must now do in order to obtain unanimous verdicts, or that a majority will deprive a man of his liberty on the basis of prejudice when a minority is presenting a reasonable argument in favor of acquittal. We simply find no proof for the notion that a majority will disregard its instructions and cast its votes for guilt or innocence based on prejudice rather than the evidence.

We accordingly affirm the judgment of the Court of Appeals of Oregon.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 69–5046

Robert Apodaca, Harry Morgan Cooper, Jr., and James Arnold Madden, Petitioners, *v.* Oregon. | On Writ of Certiorari to the Court of Appeals of Oregon.

[May 22, 1972]

MR. JUSTICE STEWART, with whom MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL join, dissenting.

In *Duncan* v. *Louisiana,* 391 U. S. 145, the Court squarely held that the Sixth Amendment right to trial by jury in a federal criminal case is made wholly applicable to state criminal trials by the Fourteenth Amendment. Unless *Duncan* is to be overruled, therefore, the only relevant question here is whether the Sixth Amendment's guarantee of trial by jury embraces a guarantee that the verdict of the jury must be unanimous. The answer to that question is clearly "yes," as my Brother POWELL has cogently demonstrated in that part of his concurring opinion that reviews almost a century of Sixth Amendment adjudication.*

Until today, it has been universally understood that a unanimous verdict is an essential element of a Sixth Amendment jury trial. See *Andres* v. *United States,* 333 U. S. 740, 748; *Patton* v. *United States,* 281 U. S. 276, 288; *Hawaii* v. *Mankichi,* 190 U. S. 197, 211–212; *Maxwell* v. *Dow,* 176 U. S. 581, 586; *Thompson* v. *Utah,* 170 U. S. 343, 351, 353; cf. 2 J. Story, Commentaries on the Constitution of the United States § 1779 n. 2 (5th ed. 1891).

I would follow these settled Sixth Amendment precedents and reverse the judgment before us.

*See pp. —, *ante* (concurring opinion of MR. JUSTICE POWELL).